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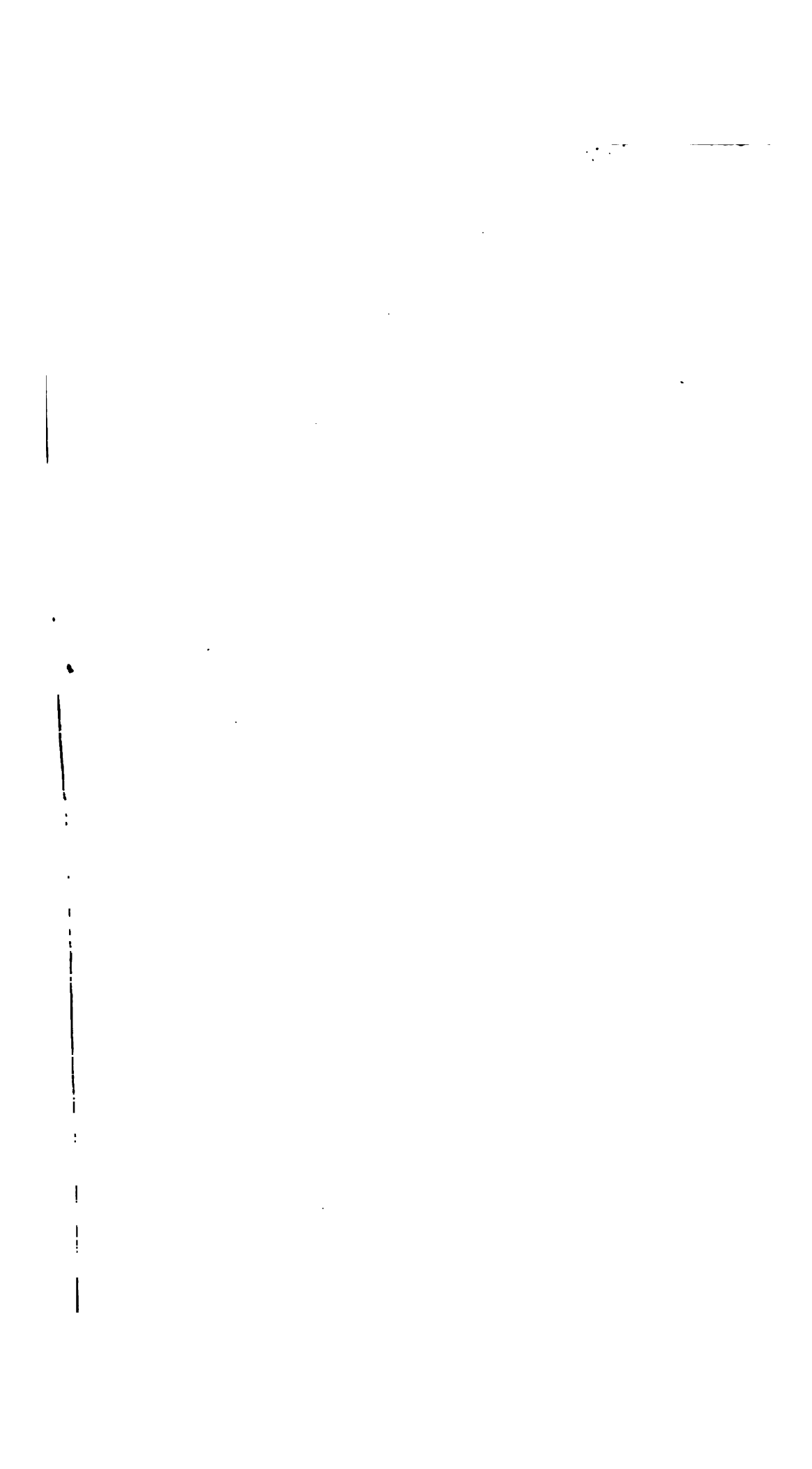
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AMERICAN ELECTRICAL CASES

(CITED AM. ELECTL. CAS.)

BEING

A COLLECTION OF IMPORTANT CASES (EXCEPTING PATENT
CASES) DECIDED IN THE STATE AND FEDERAL
COURTS OF THE UNITED STATES FROM 1873
ON SUBJECTS RELATING TO

THE TELEGRAPH, THE TELEPHONE, ELECTRIC
LIGHT AND POWER, ELECTRIC RAILWAY,
AND OTHER PRACTICAL USES
OF ELECTRICITY

WITH ANNOTATIONS

EDITED BY

WILLIAM W. MORRILL,

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AMERICAN ELECTRICAL CASES.

MICHIGAN TELEPHONE COMPANY V. CITY OF ST. JOSEPH.

Michigan Supreme Court, October 17, 1899.

(121 Mich. 502.)

TELEPHONE WIRES—MUNICIPAL CONTROL.

The establishment of rules and regulations governing the erection of telephone apparatus in streets is administrative, not judicial. The court may order a municipality to make such regulations, but cannot itself make them.

A municipality having authorized a telephone company to use its streets, subject to reasonable regulation by the city, which authorization by acceptance, etc., has become a contract, cannot nullify it by refusing to make regulations.

Cases of this series cited in opinion: *City of Richmond v. So. Bell Teleph. & Tel. Co.*, vol. 7, p. 83; *New Orleans v. Gt. So. Teleph. & Tel. Co.*, vol. 2, p. 122; *Newman v. Avondale*, vol. 4, p. 82; *Hudson Teleph. Co. v. Jersey City*, vol. 2, p. 133.

Appeal by both parties from decree of Berrien County Court in Chancery.

The averments of the bill of complaint are substantially as follows: Complainant is a corporation organized under Act No. 129, Pub. Acts 1883 (3 How. Ann. St. c. 102a, sec. 3718a). Its principal office is in Detroit. It carries on in the city of St. Joseph and other cities and towns in the State the construction, maintenance, and operation of telephone lines and exchanges, and connects with the lines of other companies without the State. It has in this State about 460 toll stations and exchanges, 3,660 miles of lines, and 6,550 miles of telephone wire, besides several hundreds of miles of pole lines and wires used in the operation of local exchanges. April 4, 1881, the Telephone & Telegraph Construction Company, a corporation

engaged in the telephone business in this State, presented a petition to the common council of the village of St. Joseph for permission to construct, maintain, and operate such a system in said village. Permission was duly granted, and that company proceeded at large expense to erect poles and stretch wires within the lines of the streets and alleys of said village until June 5, 1891, when said village became incorporated as a city. Complainant duly acquired by purchase all the property, rights, and privileges of said construction company. It has since continued to do business in said city, and has furnished to said city two telephones free of charge, and four others at rates below the usual charges. It has permitted said city to occupy certain poles with its fire-alarm wires without charge. August 3, 1897, complainant erected in a good and workmanlike manner, and in accordance with the terms of the statute, certain poles in said city for the purpose of connecting with its central office the premises of persons who had subscribed for telephone service. August 3, 1897, the common council passed a resolution declaring said poles and wires a nuisance, and instructed the street commissioner to forthwith remove them; and they adopted a resolution providing that if complainant thereafter should place any telephone poles in any streets or alleys of the city, without first having obtained permission, said commissioner should forthwith remove them. The commissioner did remove the poles and wires so erected. After this action was taken, complainant, on August 10th and 18th, presented two petitions to the common council, asking permission to erect poles in certain specified streets and alleys. The council refused to grant permission, and permitted a rival company, known as the Twin City Telephone Company, engaged in the same business, to set up poles and string its wires in the streets and alleys of the city. Complainant was willing and anxious to conform to all reasonable and valid regulations with reference to the placing of its poles and stringing of its wires, and so stated in said petitions. The erection of these poles and wires is essential to enable complainant to do its business and meet

the requirements of its subscribers. There is ample space on the streets, and no public necessity justifies the refusal. Under the act authorizing its incorporation, complainant has power to construct and maintain lines of wire, with the necessary erections and fixtures for use in transmitting messages, along, over, across, or under any public places, streets, and highways in the State. Alleges its duties to receive and transmit messages without discrimination, and to furnish service without unreasonable delay. By the acceptance of the resolution of 1881, and the construction and maintenance of its telephone system, and by the granting of special rates and privileges to the city, a valid contract has been created between the parties, by virtue of which the city is estopped from denying the complainant's right to maintain and use existing poles and wires, and to continue to set poles and string wires over, on, and in the streets and alleys of the city. It alleges that the action of the council (1) deprives complainant of its vested rights; (2) impairs the obligation of a contract; (3) deprives it of property without due process of law, and denies to it the equal protection of the laws; (4) operates as a regulation of commerce among the States; (5) will produce irreparable injury. The relief asked is an injunction to restrain defendant from removing or interfering with complainant's poles and wires, and from interfering with the replacing of the poles already removed and with the erection of new ones. The answer denies some of the allegations of the bill, and sets up new matter in defense. It does not, however, dispute the substantial and material allegations of the bill. It admits the removal of the poles, and the refusal to act upon the petitions of August 10th and 16th. It defends under an ordinance passed June 8, 1897, by which it was enacted that "no telegraph or telephone poles shall be located or erected on any street, alley, or public place in said city, and any such pole now erected shall not be taken up and again erected, without the consent of the city council." It sets up the ordinance granting a franchise to the Twin City Telephone Company, and states "that it has no doubt whatever that, if the complainant should ask for a similar

franchise at the hands of the city council, the same would be granted." Issue was duly framed, and the case heard in open court. September 21, 1898, the court made an order holding that the common council had the right to provide reasonable rules and regulations by which the complainant should be governed in the extension of its lines; that the council had no authority to arbitrarily prohibit complainant from erecting poles and wires upon the streets and alleys; that the reasonableness of such rules or regulations was subject to the review of the court; that, unless said council should within 30 days pass and enact rules and regulations by which complainant was to be governed in the extension of its lines, the writ of injunction should issue, prohibiting the defendant from interfering with the complainant in erecting its poles or placing its wires. The order further required that before extending its lines, complainant should present to the court a statement of the manner in which it proposed to proceed with such extension, and prohibited complainant from proceeding except under such reasonable rules and regulations as the court shall deem necessary for the public safety and convenience. On November 11th following, a formal decree was entered substantially the same as the order above recited. From this decree both parties appeal. Complainant attacks only so much of the decree as provides that the court shall establish the reasonable rules and regulations. The defendant attacks the decree in its entirety.

Wells, Angell, Boynton & McMillan (N. A. Hamilton, of counsel), for complainant.

James O'Hara (Lawrence C. Fyfe and O'Hara & O'Hara, of counsel), for defendant.

GRANT, C. J. (after stating the facts): 1. It is conceded by the learned counsel for both parties that that part of the decree by which the court assumed the right to establish reasonable rules and regulations is void. This is a legislative or administrative function, and not a judicial one. The court has power to put the proper authorities in the defendant city in motion to

adopt reasonable rules and regulations, and to pass upon the validity of such action when taken. This is the extent of its authority. *Houseman v. Kent, Circuit Judge*, 58 Mich. 364; *City of Manistee v. Harley*, 79 Mich. 238. Other courts recognize the same rule. *Reagan v. Trust Co.*, 154 U. S. 362, 14 Sup. Ct. 1047; *Appeal of Norwalk St. Ry. Co.*, 69 Conn. 576; *Nebraska Tel. Co. v. State*, 55 Neb. 627.

2. It is urged that the permission granted to the Telephone & Telegraph Construction Company was personal to that company and could not be alienated without the consent of the city. That company was organized under a general law of the State, and derived its powers and obligations from that law. The only power which a city could have exercised over it was that of regulation. This is also true of the complainant. The transfer was made August 31, 1895, was recognized as valid by the city, and has been acted upon by both the city and the complainant since that time; the latter having expended large sums of money upon its business and improvements. Whether the city is now in position to question the validity of this transfer is at least debatable but, as it is not argued by counsel, we refrain from discussing it. Counsel for the defendant cite in support of their contention 25 Am. & Eng. Enc. Law, 751, where it is stated "that the grant of a franchise, public in nature, like that of a telegraph company, is personal to the grantee, and cannot be alienated except by consent of the granting power. Therefore a telegraph company has no power, in the absence of special authority, to alienate the privileges granted to it by the Federal or State government, and an agreement to transfer such privileges is *ultra vires* and void." The compiler cites, to sustain the text, *U. S. v. W. U. Telegraph Co.*, 50 Fed. 28, and *W. U. Telegraph Co. v. Union Pac. Ry. Co.*, 1 McCrary, 581, 3 Fed. 721. The general power of alienation was not discussed in the former case, nor was it raised. The conclusion reached was based upon the language of the act of Congress authorizing the construction of the original Union Pacific railroad. The company sought to transfer its telegraph line, and to avoid its duty

to maintain it. It was noted as a significant fact that the words "railroad and telegraph" were used in connection 38 times in the act. The railroad company was not seeking to transfer all its property, rights, and privileges to a successor who would be obliged to perform all the duties imposed by the act of Congress, but was seeking to carve up its franchise and transfer a part of it to another corporation. The duty of the railroad company to maintain a telegraph was held to be personal. The same principle was approved in *W. U. Telegraph Co. v. Union Pacific Ry. Co.* We are also cited to *Crow. Electricity*, sec. 158, which reads as follows: "A grant to a telephone, telegraph, electric light, or railway company of the power to use the streets, highways, and post roads for the stringing of its wires and the setting of its poles contains so much of an element of personal obligation, that such a grant is not assignable unless such a power of assignment is expressed in the language of the grant, or in some general legislation affecting the subject." The same authorities are there cited to sustain the proposition as were cited in the encyclopedia, and in addition *Atlantic & P. Tel. Co. v. Union Pac. Ry. Co.*, 1 Fed. 745. That case involved the same act as the others: The last clause of the above section reads, "If the grant is in terms to X., his successors and assigns, or similar language, it is assignable," and cites *Atkinson v. Railway Co.*, 113 N. C. 581; *Toledo Consol. St. Ry. Co. v. Toledo St. Ry. Co.*, 6 Ohio Cir. Ct. R. 362; *California State Tel. Co. v. Alta Tel. Co.*, 22 Cal. 398; *Newman v. Village of Avondale*, 4 Am. Electl. Cas. 82, 31 Wkly. Law Bul. 123. In *Atkinson v. Railway Co.*, the question is not raised or discussed. The case was disposed of upon a demurrer to the bill of complaint, which set up that complainant had obtained a license from the city to build a street railway; that he had assigned it in escrow to one M., who, in breach of the trust reposed in him, assigned it to the defendant corporation. The right of sale and transfer of all the property of the corporation is not alluded to in the decision. In the Ohio case the contest was between two street railways, the question being as to the right of one company to use the tracks of

another. I do not find that the power to sell and transfer is even referred to in the case. In the California case the question is neither raised nor discussed. The sale there made was opposed upon other grounds. Page 428. The case of *Newman v. Village of Avondale* I have been unable to find. If defendant's contention be true, a mortgage of the property and franchise of these corporations would be void. The mortgage and bonds would be valueless unless there was a right to foreclose, sell, and convey to another party a valid title to the property. In *Detroit v. Mutual Gaslight Co.*, 43 Mich. 594, the grant was to the corporation, or rather to the incorporators or their assigns, who were to organize a corporation. The ordinance was silent upon the right of alienation, yet the sale of its entire property was held valid. It is immaterial that the construction company was not organized under the same act as was the complainant. It was organized under another act, empowering such companies to carry on the like business; and one of its objects declared in its articles of association was the purpose of erecting and operating telegraph lines, etc., in the cities and towns of the State. The public was not concerned in the transfer to another corporation. It suffered no injury. The assignee was subject to the same control and obligated to the same duties as was its assignor. Justice CHRISTIANCY, in *Joy v. Road Co.*, 11 Mich. 164, asserted the right of corporations to dispose of their property by absolute sale or mortgage in payment of their debts, unless such right is limited by some express provision or just implication of a statute, or by the general policy of the State, to be deduced from its legislation. In this opinion Chief Justice MARTIN concurred. The other justices held the mortgage in that case valid under the statute, but reserved their opinions as to the general power of such corporations to mortgage. But, whatever may be the common-law rule, the statute puts the question at rest, and expressly authorizes corporations to alienate their property. 3 How. Ann. St., sec. 4904a. The sale, therefore, to the complainant was valid.

3. When the construction company and the complainant ac-

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cepted the privileges granted to them by the laws of the State, and the municipality had duly given its permission, and the corporations had expended their money in valuable improvements, contracts were entered into which neither the State nor the municipality could impair or destroy, in the absence of power to do so being reserved in the grant itself, or in the constitution, which becomes a part of all such contracts. The constitution and the statute clothe municipalities with power to control their streets and alleys and protect them from things injurious and dangerous to the public; hence they have the power to make all reasonable rules and regulations for the erection and maintenance of poles and wires for telegraph and telephone companies. Here its power in the matter ceases. *Detroit v. Mutual Gaslight Co.*, *supra*; *Grand Rapids v. Grand Rapids Hydraulic Co.*, 66 Mich. 606; *City of Saginaw v. Swift Electric Light Co.*, 113 Mich. 660; *Baltimore Trust & Guarantee Co. v. Mayor, etc., of City of Baltimore*, 64 Fed. Rep. 159; *City of New Orleans v. Great Southern Telephone & Telegraph Co.*, 2 Am. Electl. Cas. 122, 40 La. Ann. 41; *City of Quincy v. Bull*, 106 Ill. 337; *Hudson Telephone Co. v. Jersey City*, 2 Am. Electl. Cas. 133, 49 N. J. Law, 303; *Town of Arcata v. Arcata & M. R. R. Co.*, 92 Cal. 639. Since the argument, counsel for defendant have called our attention to the recent case of *City of Richmond v. Southern Bell Telephone & Telegraph Co.*, 7 Am. Electl. Cas. —, 174 U. S. 771. The company in that case was acting under a law of Congress, and claimed the right under the act of Congress to use the streets without interference by the city authorities. The Circuit Court of Appeals held that the rights and privileges granted by the Act of Congress were subject to the lawful exercise of the police power belonging to the State or its municipalities. This holding was affirmed by the Supreme Court. That case is no authority for the action of the common council in the case before us. The city of Richmond had, through its common council, adopted an ordinance prescribing the terms under which the telephone company might use its streets. The reasonableness of that order was not ques-

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tioned. The question is not, as counsel for the defendant state, the right to regulate the use of its public streets. This right is conceded by the complainant, and in the petition it presented to its common council. The action of the council is practically prohibitive of the use of the streets. The defendant city by its act of incorporation obtained no other or greater rights or control over the complainant than the village had over it and its assignor. Both, under the police power inherent in municipalities, possessed the right of reasonable regulation. The city succeeded to the rights of the village of St. Joseph, and was in fact the same body politic. *Grand Rapids v. Grand Rapids Hydraulic Co.*, 66 Mich. 606.

In reason and authority, it was the clear duty of the defendant to act upon the petitions presented to its common council by the complainant, and to establish reasonable rules and regulations for the erection of poles and the stretching of wires. The decree in this respect is affirmed. Decree will be entered in this court in accordance with this opinion, and the defendant given thirty days after service upon its mayor of a certified copy of the decree to adopt rules and regulations in accordance therewith. Complainant will recover the costs of both courts. The other justices concurred.

NOTE.—See note 2 at end of Part I.

MICHIGAN TELEPHONE COMPANY V. CITY OF BENTON HARBOR.

Michigan Supreme Court, October 17, 1899.

(121 Mich. 512.)

TELEPHONE LINES—MUNICIPAL CONTROL.

The power of a municipality to regulate and control the use of streets by telephone companies empowered by law to use streets, for wires and fixtures is limited to its police power, and cannot be extended to the imposition of other conditions than those based on public convenience or safety. A statute authorizing telephone companies to use streets for their wires and appliances, not interfering injuriously with other public uses, will not be regarded as repealed or modified by implication by a later city

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charter which clothes the city council with power to regulate or prohibit among other things, telephone lines in streets.

Cases of this series cited in opinion: *People v. Eaton*, vol. 5, p. 87; *Pensacola Teleph. Co. v. W. U. Tel Co.*, vol. 1, p. 250; *Leloup v. Port of Mobile*, vol. 2, p. 79; *Southern Bell Teleph. Co. v. Richmond*, vol. 6, p. 1; *State v. Flad*, vol. 2, p. 128; *Wisconsin Teleph. Co. v. Oshkosh*, vol. 1, p. 687.

Appeal by complainant below from decree of Berrien County Circuit Court, dismissing bill.

Wells, Angell, Boynton & McMillan (N. A. Hamilton, of counsel), for appellant.

F. H. Ellsworth (G. M. Valentine, of counsel), for appellee.

GRANT, C. J.: This case in its facts differs in only one particular from that of the same complainant against the city of St. Joseph (*ante*, page 1), the opinion in which is filed simultaneously with this. In that case the records of the common council showed a resolution adopted granting permission to the Telephone & Telegraph Construction Company, while in this case the records of the common council do not show that such permission was granted. These two cities are contiguous to each other,—separated only by a river. The work of the construction company in each was begun and carried on at the same time, and the construction company and its assignees, the complainant, have ever since been in the enjoyment of the same rights in Benton Harbor as in St. Joseph. The complainant presented a petition to the common council of Benton Harbor couched substantially in the same language, and asking for the same privileges as it presented to the common council of the city of St. Joseph. The council denied the prayer of the petition. The court denied relief in this case, while granting it in the other, because the records of the council did not show the grant of permission which it held was essential to the creation of a contract. The complainant, at the request of the council, furnished for the use of the city one telephone free of charge, and two other telephones at rates less than those charged to other subscribers for like service, which rates have been paid by the city. In the year 1893 complainant, on application of the city, granted per-

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mission to the city to carry its fire-alarm wires on the company's poles, which permission was accepted by resolution adopted by the council. The complainant gave evidence tending to show that the construction company in February, 1881, presented a petition to the common council, and that it was notified by the clerk that permission had been granted. The city clerk testified that he could find no papers of any kind in his office, presented to the council from 1881 to 1887.


Complainant contends that a contract existing between it and the city, arising out of the establishment of its system by the permission of the municipality, and the maintenance thereof for many years, and that the defendant is now estopped to deny such contract. In the view we take of the case, it is unnecessary to determine this question. Section 4 of the act (Acts 1883, p. 131), providing for telephone and messenger service companies reads as follows: "Every such corporation shall have power to construct and maintain lines of wire or other material, for use in the transmission of telephonic messages along, over, across, or under any public places, streets, and highways, and across or under any of the waters in this State, with all necessary erections and fixtures therefor; provided, that the same shall not injuriously interfere with other public uses of the said places, streets and highways, and the navigation of said waters; to construct, provide and furnish instruments, devices, and facilities for use in the transmission of such messages, and to construct, maintain and operate telephone exchanges and stations, and generally to conduct and carry on the business of providing and supervising communication by telephone, and also the business of furnishing messenger service in cities and towns." 3 How. Ann. St. sec. 3718d. The statute also requires every such company to supply the public with telephones and telephonic service, to operate a telephone exchange, and to receive and transmit messages without discrimination, upon payment or tender of the usual or customary charges. *Id.*, sec. 3718i. The complainant is engaged in interstate commerce, as its business extends into other States. The State has control over its

public streets and highways, and may authorize their use for the purposes of travel and commerce without the permission of the municipalities. The State does not surrender to municipalities entire control over its streets and highways. They are under legislative control. Cooley, Const. Lim. 588. "They are for the use of the public in general, for passage and traffic, without distinction. The restrictions upon their use are only such as are calculated to secure to the general public the largest practical benefit from the enjoyment of the easement. When the highway is not restricted in its dedication to some particular mode of use, it is open to all suitable methods" *People v. Eaton*, 5 Am. Electl. Cas. 87, 100 Mich. 208, and authorities there cited. "No city or village has the power, by ordinance or by-law, to make general laws of the State inoperative." *People v. Kirsch*, 67 Mich. 539. Where a water company is authorized by its charter to lay pipes and distribute water, it has a right of access to the streets for that purpose, to be exercised in harmony with the public convenience. The city may regulate its exercise so as to prevent injury to other interests, but cannot interfere with the reasonable exercise of such right. *City of Grand Rapids v. Grand Rapids Hydraulic Co.*, 66 Mich. 606; *Atlantic City Waterworks Co. v. Consumers' Water Co.*, 44 N. J. Eq. 427. Held, that an electric telegraph "is indispensable as a means of intercommunication, but especially is it so in commercial transactions. * * * Goods are sold and money paid upon telegraph orders; contracts are made by telegraphic correspondence, cargoes secured, and the movements of ships directed." *Pensacola Teleph. Co. v. W. U. Tel. Co.*, 1 Am. Electl. Cas. 250, 96 U. S. 1. The same statement now applies to the use of the telephone. It is as indispensable to commerce as is the telegraph. Telephone companies are subject to the same rules as common carriers. *Delaware & A. Teleph. & Tel. Co. v. Delaware*, 2 C. C. A. 1, 50 Fed. 677. The same rule is held in *Leloup v. Port of Mobile*, 2 Am. Electl. Cas. 79, 127 U. S. 640, holding that telegraphic communications are commerce, and that the State cannot impose a tax upon the occupation or business, or exact a

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license. The same rules apply to telephone companies. *Southern Bell Teleph. & Tel. Co. v. City of Richmond*, 6 Am. Electl. Cas. 1, 78 Fed. 858. Where the statute provided that "telephone companies organized under its provisions for the purpose of constructing and maintaining telephone or magnetic telegraph lines are authorized to set their poles, piers, abutments, wires, and other fixtures along and across any of the public roads, streets, and waters of this State, in such manner as not to incommode the public in the use of such roads, streets, and waters" (Rev. St. 1879, sec. 879), held, that the municipal authorities could regulate by ordinance the location, kind of posts, piers, and abutments, and height of wires, but that no other restrictions could be imposed than those provided by the law. *State v. Flad*, 2 Am. Electl. Cas. 128, 23 Mo. App. 185. It will be observed that the act under which complainant is organized does not require the consent of the municipality to the construction of its lines. The reason of this is apparent. The business carried on by these corporations is not local, but extends over and outside the State. Where the business is purely local, the legislature, in authorizing the formation of these corporations, usually provides that it must be with the consent of the municipality. Such is the requirement in the case of tramways. 1 How. Ann. St., sec. 3527. So of street railways. *Id.*, sec. 3548. So of water companies. *Id.*, sec. 3115. So of electric light companies. *Id.*, sec. 4191.

Evidently it was not the intention of the legislature to permit municipalities to prevent telegraph and telephone companies from extending their business along the public highways and streets of the State. This rule seems practically to be conceded by the learned counsel for the defendant, for they say that the complainant's rights, if it has any, are subject to the valid exercise of the police power of the city. Complainant concedes this to be the law. The learned circuit judge who tried the case also conceded it, but said that the city "was not confined merely to the exercise of its ordinary police powers." Evidently the city desired to impose other conditions, and in furtherance of this desire its council arbitrarily refused to permit complainant to



erect its poles and stretch its wires. Such refusal was not based on the inconvenience of the public or the obstruction of its streets. Under this statute the sole authority of the municipality is the proper exercise of the police power, inherent in it, to protect the public from unnecessary obstructions, inconveniences, and dangers, and to determine where and in what manner complainant may erect its poles and stretch its wires so as to accomplish this result. It has no authority to impose other conditions. That authority rests in the legislature,—the charter-making power.

It is, however, insisted that Act No. 215, Pub. Acts 1895, under which the defendant was incorporated, repeals the telephone act, in so far as it may be held to authorize the use of highways and streets for the erection of poles without the consent of the municipality. Section 14, c. 22, of that act provides, "They [the council] shall have authority to regulate or prohibit the display, use, or placing of signs, advertisements and banners, awning posts and telegraph, telephone or light poles in or over the streets."

The title of this chapter is, "Streets and Public Grounds," and the above language is found near the middle of the section, which specifies various subjects upon which the council may legislate. Repeals by implications are not favored. To this proposition it is unnecessary to cite authorities. The intent to repeal must very clearly appear, and courts will not hold to a repeal if they can find reasonable ground to hold the contrary. *Merrill v. President, etc.*, 35 Mich. 211; *Connors v. Iron Co.*, 54 Mich. 168. This case forcibly illustrates the danger in holding general laws repealed by imputation in granting charters to municipal corporations. Did the legislature intend by the above law for the organization of cities to confer upon those municipalities the power to annul the law in regard to telegraph and telephone companies, and to entirely prohibit the use of the telegraph and the telephone, which have become essential in commercial transactions? Clearly such an intention should not be attributed to the legislature unless the language of the law leads to no other conclusion. We see no difficulty in giving

effect to both laws by holding that the latter act confers this authority upon municipalities, subject to the general laws of the State in regard to the use of its streets and highways for telegraph and telephone purposes. These municipalities may, under this law, prohibit the erection of these poles in places and in a manner which will injure or incommode the public. This was the view taken by the Supreme Court of Wisconsin under a similar provision. *Wisconsin Telephone Co. v. City of Oshkosh*, 1 Am. Electl. Cas. 687, 62 Wis. 32, 40. The decree of the court below will be reversed, and decree entered in this court, in accordance with this opinion, directing the common council of the defendant to provide, by ordinance or otherwise, reasonable regulations for the erection of the poles and stretching the wires of the complainant. Complainant will recover the costs of both courts. The other justices concurred.

NOTE.—See note 2 at end of Part I.

JONAS S. COVERDALE ET AL. v. JOHN D. EDWARDS.

Indiana Supreme Court, October 30, 1900.

(155 Ind. 374.)

ELECTRIC LIGHT APPLIANCES.—MUNICIPAL CONTROL.—LICENSE

A statute authorized any city to grant the right to place electric light appliances in its streets, under such restrictions as it might enact. A city council granted a right to plaintiff's assignor, an electric light company, reserving the right of revocation and of removal of the poles at its discretion. The council afterward contracted with plaintiff to light the streets for three years and at the expiration of the contract ordered their removal, to make way for poles for a municipal lighting plant.

Held, that the plaintiff had a mere license, and the council was within its rights;

That the statute authorized the council to restrict the franchise by reserving the right to revoke at pleasure;

That the resolution directing the removal of the poles was broad enough to cover poles for street lighting, and was not confined to those for commercial lighting.

That summary proceedings were proper, the city not being obliged to bring

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suit to compel the removal of the appliances, since plaintiff's neglect to remove them upon notice made them nuisances *per se*.

That in an action against the city marshal for injury to the appliances, the recovery must be limited to the damage caused by the marshal's abuse of his power, to wit, the difference in value between the appliances as removed and their value if properly removed.

Case of this series cited in opinion: *Am. Rapid Tel. Co. v. Hess*, vol. 3, p. 142.

Appeal by defendant below from judgment of Circuit Court, Allen County, in favor of plaintiff, and from order denying new trial.

Mann & Beatty, J. T. France, and O. N. Cranor, for appellants.

Peterson & Peterson, H. F. Colerick, C. J. Lutz, R. K. Erwin, and P. G. Hooper, for appellee.

BAKER, C. J.: This action was begun in the Adams Circuit Court. The venue was changed to Wells, and thence to Allen. Appellee's complaint charged that appellants, in pursuance of a conspiracy to injure appellee, maliciously cut down certain poles and electric wires belonging to appellee, and lawfully maintained by him in the streets of the city of Decatur, Ind., thereby destroying his property and business, to his damage in the sum of \$15,000. Appellants filed answers in general denial and in justification. Appellee's demurrer was sustained to the answers in justification. The trial resulted in a general verdict and judgment in favor of appellee for \$4,000. Appellants' joint motion for a new trial was overruled. The joint motion of two appellants, the city attorney of Decatur and his law partner, for a new trial, was overruled. Errors are assigned on each adverse ruling.

Inasmuch as the appellants admit in their brief that the court allowed them, under their general denial, to introduce all the evidence that would have been admissible under their answers in justification, the error, if any, committed in sustaining the demurrer was not injurious.

The principal contentions are that the verdict is not sustained by the evidence, and is contrary to law, and that the damages are excessive. Of the thirteen appellants, five were councilmen of the city of Decatur, one was the city attorney, one was the city attorney's law partner, who joined in advising the council, one was the city marshal, and five were persons employed by the city marshal to assist him in executing the commands of the council. In 1889 the council adopted the following resolution: "Resolved, that the Thomson & Houston Electric Light Company be, and are hereby, given and granted permission to plant and erect poles in the streets and alleys of Decatur for the purpose of stringing wires thereon to furnish electric lights to the citizens of said city. The planting of such poles shall be made under the direction of the street commissioner of said city, and he shall see that the same are not erected so as to inconvenience said citizens. The said council hereby reserve the right to revoke this grant, and demand that the poles be removed, and remove the same, if necessary." The Thomson & Houston Company erected certain poles and wires, and afterwards conveyed the property to appellee, and assigned to him the rights under the foregoing resolution. The city did not formally consent to the assignment, but in 1893 the city entered into a contract with appellee, whereby appellee was engaged to supply the city with a certain number of street lights for three years at so much per light per year. After the expiration of this contract the city decided to put in an electric light system for itself. On August 18, 1897, the council adopted the following resolution: "Whereas, the common council of the city of Decatur, Indiana, on the 10th day of February, 1893, entered into contract with one J. D. Edwards, whereby said Edwards agreed to supply the city of Decatur with a certain number of street lights for the term of three years at a certain price per light per annum, which contract is spread of record in the record of proceedings of the common council of the said city of the

date of February 21, 1893; and whereas, the contract under which the said Edwards furnished the said city with electric lights expired on the 10th day of February, 1896, and has not been renewed, but was, by resolution of the said common council, discontinued on the 13th day of July, 1897; and whereas, under the said contract, the said Edwards erected a number of poles in the streets, alleys, and public grounds of the said city, and strung wires and lamps thereon for the purpose of supplying the said electric lights to said city for street purposes, which poles, wires, and lamps are now not being used, and are in the way of others which the said city proposes to erect for the construction of an electric light plant to be owned and controlled by the said city: Therefore, be it resolved, that the city marshal be, and he is hereby, directed to notify the said J. D. Edwards to take down and remove all his poles from the streets and alleys and public grounds of the said city within fifteen days from the date of the receipt of the notice, or the same will be removed by said marshal under and by order of the common council; and be it further resolved that, should the said Edwards fail or refuse to remove or cause to be removed all such poles, wires, and lamps from the said streets, alleys and public grounds within the time mentioned in the said notice, the said marshal shall procure sufficient help, and remove the said poles, wires, and lamps immediately thereafter." On August 19, 1897, the marshal served upon appellee the following notice: "To J. D. Edwards: You are hereby notified that the common council passed a resolution at their meeting held August 18, 1897, ordering the removal of all your poles, wires, and electric lamps from the streets, alleys, and public grounds of the city of Decatur, Indiana, within fifteen days from the date of the receipt of this notice by you. You are therefore hereby notified to remove or cause to be removed all the electric light poles, wires, and lamps now erected and maintained by you in any of the streets, alleys, and public grounds in said city within fifteen days from this date, or I will, under orders of the said council, cause the same to be taken down and removed far enough that

they will not interfere with the erection of new poles, wires, and lamps to be erected by said city. Dated this 19th day of August, 1897. M. F. Cowan, City Marshal." At the time of passing the resolution of August 18, 1897, the members of the common council did not know of, or did not remember, the grant of 1889. Appellee removed some of the poles and wires that had been used in lighting the streets, but left standing others of that line, and all of the line used in supplying lights to individuals. By September 28, 1897, the construction of the city's line had reached the places where appellee's poles and wires were left standing. The marshal had not yet executed the order contained in the resolution of August 18th. At their regular meeting on the evening of September 28th, the common council, in executive session, passed the following resolution: "Whereas, on the 18th day of August, 1897, the common council of the city of Decatur, Indiana, ordered the removal of the electric light poles, lamps, and wires of J. D. Edwards from the streets, alleys and public grounds of said city within fifteen days from the date of the receipt of notice by him; and whereas, in accordance with the resolution then adopted, the marshal of the city then notified the said Edwards on the 19th day of August, 1897, to take down and remove within fifteen days all of such poles, wires, and lamps from the streets, alleys, and public grounds of said city; and whereas, the said Edwards has only partially complied with the requirements of said resolution, and has left standing on Main or Second street, between Jefferson and Jackson streets, all his poles, lamps, and wires, the same as before the adoption of said resolution and service of such notice; and whereas, it is imperative that the city of Decatur shall have the immediate use of Second street from Jefferson to Jackson street on both sides thereof: Therefore, be it resolved, that the city marshal be, and he is hereby, ordered to employ sufficient force of men to immediately remove from said Second street between Jefferson street and Jackson street all

poles, wires, and lamps belonging to said J. D. Edwards by removing the wires and lamps and cutting down the poles, doing as little damage to the poles, wires, and lamps as, under the circumstances, is practicable." After the adjournment of the meeting some of the members of the common council directed the marshal to remove appellee's poles and wires that night. One of the attorneys notified a workman that the marshal would need his services. About 2 o'clock that night the marshal and his assistants cut the wires, and sawed off the poles from six inches to two feet above the ground. The consequence was that appellee was unable longer to conduct his business. The marshal and those who assisted him in removing the poles and wires acted solely in obedience to the orders of the council, and not at all from any intention or willingness to injure appellee. The foregoing facts are shown by the evidence without conflict.

The objections to the evidence and the disputes as to the facts arose mainly with reference to the motives of the councilmen and the amount and elements of damages. The councilmen claimed that in deciding that the city should own a plant for itself, and in passing the resolution hereinabove set forth, they in good faith exercised only their best judgment as councilmen in the city's interests. They claimed that in ordering the removal of the poles and wires during the night of September 28th, they were influenced only by the considerations that the city needed the immediate use of the streets, that the removal at night would avoid interference with traffic, and possible accidents to onlookers, and breaches of the peace, and that further postponement might result in the city's becoming involved in a suit by appellee to restrain any removal. On the other hand, there was evidence from which a jury might infer that some of the appellants who were councilmen were actuated by a malicious intention to injure appellee. The court, in the admission of evidence and in the instructions to the jury, submitted the question of damages on these elements: The destruc-

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the assignment, and made the license irrevocable during the life of the contract. At the expiration of the contract, appellee stood as the lawful assignee of the Thomson & Houston Company's license. That license contained this provision: "The said council hereby reserve the right to revoke this grant, and demand that the poles be removed, and remove the same if necessary." The language is clear, and the meaning unmistakable. The grant was a bare license, revocable without cause at the will of the council. If the licensee, at the revocation of the grant, should not remove the poles on demand, the council might cause their removal. Appellee claims that under section 4303, Burns' Rev. St. 1894 (sec. 3106c, Horner's Rev. St. 1897), the council may restrict the method of use, but may not limit the time. The legislature confided an unreserved discretion to the council. The unqualified right to grant or refuse at discretion carries with it the right to impose any terms on the grant not forbidden by law. The discretion of the council is not confined by the law to the mere restriction of methods of use, and therefore extends to restriction of time. *City of Indianapolis v. Navin*, 151 Ind. 139, 143, 47 N. E. 525, 41 L. R. A. 337; *Citizens' St. R. Co. v. City R. Co.*, 64 Fed. 647, 656.

Appellee next contends that, even if the council had the right to terminate the license as a whole, the resolution of August 18th and the notice of August 19th were not effective to end appellee's right to maintain his commercial plant. The argument is based on recitals in the preamble. The preamble is no part of the resolution. A preamble may be looked to in aid of the interpretation of an ambiguity in a resolution; but, if the terms of the resolution are clear, a preamble cannot be allowed to cast a doubt upon the meaning. 23 Am. & Eng. Enc. Law, 329-331. Here the resolution in explicit terms ordered appellee to remove all his poles that were maintained in the streets and alleys of Decatur, and the notice followed the resolution. But, if outside matters were to be taken into consideration in determining the meaning of

the resolution, the fact that the council on August 18th had forgotten, or did not know of, the Thomson & Houston Company's license would indicate that they supposed that appellee had no license except the one which was implied by the contract of 1893, and which became a bare license, revocable at will in 1896. Under this view, the preamble, like the body of the resolution, was aimed at appellee's entire system.

Appellants, in their relations to the resolution and acts thereunder, are naturally divisible into three groups: the councilmen, the marshal and those who assisted him in the removal of the poles, and the attorneys of the city. The motives or influences that led the councilmen to pass the resolutions were irrelevant if the subject-matter was within the scope of their authority. *Throop*, Pub. Off. § 709; *Mechem*, Pub. Off. §§ 644-646; *Buell v. Ball*, 20 Iowa, 282; *Freeport v. Marks*, 59 Pa. St. 253. What poles and wires should be permitted in the streets was a question in relation to which the councilmen owed a duty to the public, and not at all to individuals. If an individual was affected, it was immaterial, unless a contract was violated. The nature of appellee's contract right in the street has already been considered. The council had authority to terminate the license at will. The remaining question is in regard to the steps the city might lawfully take in effecting the removal of the poles and wires. There is no doubt of the right of the city to begin legal proceedings to that end (*American Furniture Co. v. Town of Batesville*, 139 Ind. 77), and appellee claims that this was the only way. Is that true? If appellee had erected the poles in the streets without any lawful authority to do so, the poles would have constituted a public nuisance per se. *City of Valparaiso v. Bozarth*, 153 Ind. 536, 45 L. R. A. 487, and cases cited. If the poles were erected under lawful authority, and if the authority was legally canceled, appellee's failure or refusal to remove the poles after notice would render them a nuisance per se, and the city's right would then be complete to remove them summarily. *City of Indianapolis v. Miller*, 27 Ind. 394; *Baumgartner v. Hasty*, 100 Ind. 575, 50 Am.

Rep. 830; *Telegraph Co. v. Hess*, 3 Am. Electl. Cas. 142, 125 N. Y. 641, 13 L. R. A. 454; note to *Orlando v. Pragg*, 34 Fla. 244; note to *City of Evansville v. Miller*, 146 Ind. 613, 38 L. R. A. 161. So it appears that in respect to both the termination of appellee's license and the method of effecting the removal of the poles the subject-matter of the resolution was within the scope of the authority of the councilmen. As the evidence fails to show that they advised or assisted in any abuse of the order of removal, the record establishes their defense of justification.

But their motion for a new trial cannot be sustained on the ground that the verdict is contrary to law, unless there is no liability on the part of the marshal and his assistants, for their motion is joint with that of the marshal. The marshal and his assistants are liable for any abuse of the order of removal. Throop, Pub. Off. § 724; Mecham, Pub. Off. § 664. On the question whether the marshal caused more than unavoidable injury in removing the poles and wires the evidence is conflicting, and therefore the verdict cannot be disturbed on that account. But the damages awarded are clearly excessive. The unfortunate destruction of his business fell upon appellee as the proximate result not of the marshal's abuse of the order of removal, but of the termination of his license, and the order of removal properly executed. The loss of his power house was due to the terms of appellee's lease, and was not legally attributable to the marshal's acts. Even with respect to the poles and wires, the question of damages was not properly submitted to the jury. The measure is the difference in value between the poles and wires properly removed and as they were actually removed. All of the appellants are entitled to a new trial on the ground that the damages are excessive.

As the city's attorneys correctly advised the council in respect to the city's authority, no question arises as to the circumstances under which, and the persons to whom, the attorneys would be liable for wrong advice. The evidence fails to

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show that they counseled or assisted in any abuse of the order of removal. Their joint motion for a new trial, separate from that of all the appellants jointly, should have been sustained on the ground that the verdict is contrary to law.

Justification is a defense that must be affirmatively pleaded. On the trial now in review, appellants were not injured by the ruling on the demurrer, because they admitted that they were permitted to introduce all their evidence under the general denial. But on a new trial appellants should have a legal basis for the introduction of their evidence.

Judgment reversed, with directions to overrule the demurrer to the affirmative answers.

NOTE.—See note 2 at end of Part I.

CLARKSBURG ELECTRIC LIGHT CO. v. CITY OF CLARKSBURG
ET AL.

West Virginia Supreme Court of Appeals, April 7, 1900.

(47 W. Va. 739.)

ELECTRIC LIGHT APPLIANCES IN STREETS.—MUNICIPAL CONTROL.—EXCLUSIVE
FRANCHISE.

(Head-note by the Court):

The council of the town of Clarksburg in 1887 had no power, either under its charter or under the general statute law governing towns and cities, to grant an exclusive franchise for twenty years to a private corporation to use its streets for the conveyance of electricity for public use in the city. Such exclusive grant does not prevent the town from granting to another corporation, within said term, the privilege to occupy its streets for the same purpose. Such exclusive grant, being void, is not a valid contract protected by the provisions in the Federal or State constitutions forbidding the passage of any law impairing the obligation of contracts. Under the general statute law of West Virginia governing cities and towns, a grant by a municipal corporation of the privilege, not exclusive, of

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occupying its streets for the conveyance of electricity for public use therein, confers a valid franchise and is a contract protected by the provisions in State and Federal constitutions prohibiting the passage of any law impairing the obligations of contracts. (The question of the reasonableness of the term of such grant not considered.)

The decision of the highest court of a State in the construction of its statutes, and as to the validity or invalidity of contracts dependent only on such statutes, is the controlling rule of decision in Federal courts, where there is no Federal question.

The grant by a city or town to an intended corporation of a franchise to use its streets for the conveyance of electricity for public use in the town or city is valid, though at its date the corporation is not chartered, but is later chartered, and accepts the grant.

Appeal by plaintiff from decree of Circuit Court, Harrison County.

John Bassel, Edwin Maxwell, and C. W. Lynch, for appellant.

M. F. Snider and Davis & Davis, for appellees.

BRANNON, J.: On the 16th of December, 1887, the council of the town of Clarksburg passed an ordinance granting to the Clarksburg Electric Light Company the exclusive privilege for the term of twenty years to erect and operate electric light works for generating and supplying electricity for lighting the town and for use as power. Under this grant the said corporation constructed a costly and valuable plant, and has been long operating the same, supplying the town and its people with electricity for purposes of illumination and power. On the 12th of March, 1894, the Traders Company was chartered by the State as a corporation to erect a hotel building with opera house, banking house, and offices therein, under which the said hotel building has been erected in Clarksburg. On the 1st day of November, 1894, the State incorporated a company called the Traders Annex Company, with power to erect buildings, construct electric light plant to light buildings and the town of Clarksburg with electricity. The two last-named companies together

erected an electric light plant, and have used the same for lighting the hotel, opera house, bank, and other apartments in the buildings erected by said companies. Said two companies, having a surplus of electricity, engaged to supply private individuals in the town. These individuals erected poles in the streets to support wires for conveyance of electricity, by leave of the town council, and the said two companies were about to obtain, or at least ask for the authority from the council of Clarksburg to erect poles in the streets for the conveyance of electricity through the town for sale to its people, and thereupon the Clarksburg Electric Light Company sued out an injunction restraining the Traders Company and the Traders Annex Company and all other persons from applying to said council for the privileges aforesaid, and restraining the city council of Clarksburg from granting to the Traders Company and the Traders Annex Company, jointly or severally, the privilege of occupying the streets for the purpose of carrying on the business of furnishing electricity to the said city and its citizens. The Circuit Court of Harrison county dissolved the injunction, and the electric light company appeals to this court.

The electric light company claims that the grant to it by the council of Clarksburg of the privilege of furnishing electricity and occupying the streets of the city with its poles for the distribution of electricity to its consumers constitutes a contract giving that company the sole and exclusive right to furnish electricity within the city, and that the use of the streets by any other company, or even persons, for furnishing electricity, is a violation of its rights, and that the grant by the said city to the Traders Company or the Traders Annex Company, as proposed, would be a violation and impairment of such contract, contrary to the constitution of the United States. Upon this position—that the proposed grant or franchise to the Traders Company and Traders Annex Company would be a violation of the contract subsisting between the electric light company and the city, and a violation of the Constitution of the United

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States—the said electric light company stakes its case in this court. The Federal Constitution (article 1, § 10) provides that “no State shall * * * pass any law impairing the obligation of contracts.” It is beyond question that a grant by a municipal corporation, under authority of the statute of a State, to a private corporation to supply a city or town with electricity for the public use, or any similar franchise, constitutes a contract, when accepted and carried out by the corporation, which is under the protection of both the State and national constitutions. *New Orleans Gaslight Co. v. Louisiana Light & Heat Producing & Manufacturing Co.*, 115 U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516; *Louisville Gas Co. v. Citizens’ Gaslight Co.*, 115 U. S. 683, 6 Sup. Ct. 265, 29 L. Ed. 510. Therefore we do not question that the electric light company possesses a contract, and lawful vested rights under it; but to what extent? Has it the right to an exclusive franchise, effectually shutting out others from transacting a very important business, so needful to the public of the city of Clarksburg? Has that company the monopoly it claims? I shall not discuss the question whether an act of the legislature granting such an exclusive franchise would be valid, further than to say that under the great powers of a State legislature such an act would likely be valid under the cases just cited and others; but I can safely say that under multitudinous authorities the courts lean against construing statutes so as to grant, or to authorize municipal corporations to grant, such exclusive franchises. Such franchises constitute monopolies, which the law has through ages condemned, because they tie down and restrain and cripple the public right and interest, and sacrifice great public interests to the benefit and aggrandisement of the few. Still, where such rights are valid and lawful, the courts must and do protect them. I state the proposition, as sustained by authorities in all quarters, that to authorize such exclusive franchise the statute must admit of no other reasonable construction. The ordinance of Clarksburg granting to the electric light company its fran-

chise does, in terms, make it exclusive; but had the council power to insert in the franchise the clause or section granting such exclusive right? That is our question in this case; that is the pivot of this case. Turn to the statute law on the subject. The town of Clarksburg was incorporated by an act of Virginia of March 15, 1849, which gave its trustees power to "improve streets, walks, and alleys." An act of February 27, 1867, gave the town "control of all county roads, turnpikes, and bridges within the limits thereof." The Virginia Code of 1860, applying to towns generally, gave the council "power to lay off streets, walks or alleys, alter, improve, and light the same, and have them kept in good order." The Code of West Virginia of 1868, p. 329 (Ed. 1891, p. 426), the law in force when the franchise claimed by the plaintiff was granted, and which applied to towns generally, provides that "the council of such city, town or village shall have power therein to lay off, vacate, close, open, alter, curb, pave and keep in good repair, roads, streets, alleys, * * * and to improve and light the same." No statute special to Clarksburg has been cited giving it power to confer such exclusive privilege. If the power to improve and light its streets does not authorize such exclusive franchise, it does not possess the power. If the general law governing cities and towns above quoted does not give Clarksburg's council power to grant such exclusive franchise, it does not possess the power. That the council, under the charter provisions and general statutes above quoted, does not possess the power to grant such exclusive franchise is settled in *Parkersburg Gas Co. v. Parkersburg*, 30 W. Va. 435, 4 S. E. 650. That case has been approved by the opinions since delivered in *Richards v. Clarksburg*, 30 W. Va. 496, 4 S. E. 774, and *Arbenz v. Railroad Co.*, 33 W. Va. 6, 10 S. E. 14, 5 L. R. A. 371, and is thus the settled law of this State. That case holds that neither the charter of Parkersburg, which was general, like that of Clarksburg, in this respect, nor the general statutes in relation to municipal corporations in force in 1864, which were the same as those quoted above, "con-

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ferred upon said city power to delegate to a private corporation the exclusive privilege of using the streets and alleys for laying gas pipes, and furnishing the city and its inhabitants with gas for 30 years. The grant by a city to a gas company of the exclusive privilege of lighting the city with gas does not deprive the city of the power to contract with an electric light company for lighting the city with electric lights." This denial of power in a municipal corporation merely under general statutes giving it control of streets and authority to light them is based on many decisions. 2 Dill. Mun. Corp. sec. 692; Elliott, Roads & S. 566; Boone, Corp. p. 35; *Grand Rapids E. L. & P. Co. v. Grand Rapids E. E. L. & F. G. Co.* (C. C.), 33 Fed. 659. This incapacity of Clarksburg to make such an exclusive grant results from the law generally prevalent that "a municipal corporation possesses and can exercise the following powers, and no others: First, those granted by express words in its charter, or the general statutes under which it is incorporated; second, those necessarily or fairly implied in or incident to the powers thus expressly granted; and, third, those essential to the declared purposes of the corporation, not simply convenient, but indispensable." *City of Charleston v. Reed*, 27 W. Va. 681; *Christie v. Malden*, 23 W. Va. 667. Surely, we cannot say, contrary to the drift of all the law of the country, that the mere power to control streets and light the same carries with it by implication the enormous power to tie the hands of an important municipality for many years, or that such a power is indispensable or necessary to enable the municipality to carry out its legitimate functions. Therefore, the council of Clarksburg had no authority to grant this exclusive franchise, and that feature of its ordinance is *ultra vires*, and therefore void, confers no right, makes no contract, and the case falls under the principle, self-evident, stated in *New Orleans v. New Orleans Waterworks*, 142 U. S. 79, 12 Sup. Ct. 142, 35 L. Ed. 943, that, "before this court can be asked to determine whether a statute has impaired the obligation of a contract, it must be made to appear that there was a

legal contract subject to impairment." The electric light company has no contract good in law to be impaired, so as to call on either State or Federal constitution for protection.

Counsel for the electric light company cite for its support the cases of *New Orleans Gaslight Co. v. Louisiana Light & Heat Producing & Manufacturing Co.*, 115 U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516, and *Louisville Gas Co. v. Citizens' Gaslight Co.*, 115 U. S. 682, 6 Sup. Ct. 265, 29 L. Ed. 510, but they do not apply, because in those cases the legislature, under its plenary power, had granted the exclusive franchise. As I said above, under the authority of those two cases, and I should add the *Slaughter-House Cases*, 16 Wall. 36, 21 L. Ed. 394; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 6 Sup. Ct. 273, 29 L. Ed. 525, and *St. Tammany Waterworks Co. v. New Orleans Waterworks*, 120 U. S. 64, 7 Sup. Ct. 405, 30 L. Ed. 563, I do not question the power, though I should question the policy, in a legislature to grant such an exclusive privilege; but those cases cannot help the plaintiff, because they involve legislative grants, whereas the plaintiff in this case can appeal to no such legislative grant, but only to a council grant, warranted by no legislative authority conferred upon that council, and not justified by the special legislation relative to Clarksburg, or the general law. I should confirm the position just stated by a reference to the case of *City of Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341, where the court asserts that, to make a grant of a franchise to furnish water to a city made by its council such a contract as is protected by the United States constitution, the council must have authority to make such grant. So the decision of this court in *Parkersburg Gas Co. v. Parkersburg* is well fortified by decisions elsewhere. But suppose it were not so fortified. It would be the law governing this court, and would show that the electric light company cannot appeal to the national constitution to protect its exclusive grant. Whether that company has or has not a valid contract depends

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on State law exclusively. It depends on the question whether that clause in the ordinance of the council of Clarksburg is warranted by the statute of the State relating to Clarksburg as a municipal corporation. Clarksburg is a municipal corporation in the State of West Virginia, and its rights are governed by and originate from State law. So with the other companies. Whether that exclusive grant makes a valid contract is to be tested by decisions of the State Supreme Court. The right depends on the construction of State statutes as to the power of the council in the matter. As long ago as *Ogden v. Saunders*, 12 Wheat. 259, 6 L. Ed. 606, the Supreme Court said: "It is the municipal law of the State, whether that be written or unwritten, which is emphatically the law of the contract made within the State, and must govern it throughout, wherever its performance is sought to be enforced." The decision of the State court of last resort upon rights dependent alone upon its laws, its statutes, is conclusive upon the Federal judiciary. In *Louisville N. O. & T. Ry. Co. v. Mississippi*, 133 U. S. 587, 10 Sup. Ct. 348, 33 L. Ed. 784, it was held that "the construction of a State statute by the highest court of the State is accepted as conclusive in this court. In *Detroit v. Osborne*, 135 U. S. 492, 10 Sup. Ct. 1012, 34 L. Ed. 260, the Supreme Court, finding that the Supreme Court of Michigan had held that under a statute of that State there was no right of action to a person injured by reason of a defect in a sidewalk, caused by the neglect of the city, although the Supreme Court of the United States differed with the Michigan court, and also said that the current of authorities differed from that court, yet followed the State decision. Justice Brewer said: "But, even if it were a fact that the universal voice of the other authorities was against the doctrine announced by the Supreme Court of Michigan, the fact remains that the decision of that court, undisturbed by legislative action, is the law of that State. Whatever our views may be as to the reasoning or conclusion of that court is immaterial. It does not change the fact that its deci-

sion is the law of the State of Michigan, binding upon all its courts, all its citizens, and all others who may come within the limits of the State. The question presented by it is not one of general commercial law; it is purely local in its significance and extent. It involves simply a consideration of the powers and liabilities granted and imposed by legislative action upon cities within the State. While this court has been strenuous to uphold the supremacy of Federal law, and the interpretation placed upon it by the Federal courts, it has been equally strenuous to uphold the decisions by State courts of questions of purely local law. There should be, in all matters of a local nature, but one law within the State; and that law is not what this court might determine, but what the Supreme Court of the State has determined. Again and again has the United States Supreme Court announced this doctrine. *Morley v. Railway Co.*, 146 U. S. 162, 13 Sup. Ct. 54, 36 L. Ed. 925, *Irrigation Dist. v. Bradley*, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369; *First Nat. Bank of Aberdeen v. Chehalis Co.*, 166 U. S. 440, 17 Sup. Ct. 629, 41 L. Ed. 1069; *Marchant v. Pennsylvania R. Co.*, 153 U. S. 380, 14 Sup. Ct. 894, 38 L. Ed. 751; *Wade v. Travis Co. (Tex.)*, 174 U. S. 508, 19 Sup. Ct. 715, 43 L. Ed. 1060. In *Railroad Co. v. McClure*, 10 Wall. 511, 19 L. Ed. 997, it is held that there is no jurisdiction in the Supreme Court, under section 25 of the judiciary act, to review a decision of the highest court of a State maintaining the validity of a law alleged to impair a contract, "when the law set up as having this effect was in existence when the alleged contract was made, and the highest State court has only decided that there was no contract in the case." Just so in the present case. The statutes testing the right of the electric company were in force when its franchise was granted, and the decision in *Parkersburg Gas Co. v. Parkersburg*, holding that under those statutes such exclusive grant could not be made, had been rendered. Now, if the decision of the State Supreme Court upon a State statute and rights dependent upon it are not conclusive, even upon the Federal

Supreme Court, the State is a nonentity, a myth. No political party since the birth of the Federal Constitution, not even the most ultra-centralizationists, so called, have ever made any such contention.

The case of *City R. Co. v. Citizens' St. R. Co.*, 166 U. S. 557, 17 Sup. Ct. 653, 41 L. Ed. 1114, is invoked in favor of the plaintiff. It holds that an exclusive privilege to a street-railway company to occupy streets for 30 years constituted a contract, which could not be impaired by a grant from the city to another company to exercise the same privilege of carrying on the like business in the same streets. But that case cannot help the plaintiff. That was a valid contract, because the city had authority to grant the exclusive franchise under State statutes, as had been held by the Supreme Court of the State. That made the franchise valid, as if it had been granted by the legislature itself, as in the case of *New Orleans Gaslight Co. v. Louisiana Light & Heat Producing & Manufacturing Co.*, 115 U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516, and other cases cited above. That this is so is made clear in the opinion by Justice Brown, saying: "That the complainant had a contract with the city is entirely clear. It was so held by the Supreme Court of Indiana in *Western Paving & Supply Co. v. Citizens' St. R. Co.*, 128 Ind. 525, 26 N. E. 188, 28 N. E. 88, 10 L. R. A. 770." The Supreme Court simply followed the rule stated above that the decision of the State court as to whether there is or is not a contract valid under State law is final. There the railroad company had a valid franchise conferred by State law, as construed by the State court; whereas, in this case the electric light company had no valid exclusive right under the West Virginia statute law as construed in *Parkersburg Gas Co. v. Parkersburg*. The difference between the two cases is plain and wide. In the one case a valid contract; in the other no contract. Counsel for the electric company cites the case of *Citizens' Sav. Bank of Owensboro v. City of Owensboro*, 173 U. S. 636, 19 Sup. Ct. 530, 43 L. Ed. 840. I am unable to see that the case contains anything bearing upon this case.

As to the argument that upon the faith of such exclusive grant the electric company has spent much money, I have only to reply that can have only a moral, not a legal, effect, and that the company was bound to know the law, and look out for its rights, under the principle that "persons dealing with a corporation must take notice of what is contained in the law of its organization, and must be presumed to be informed of the restrictions annexed to the grant of power by the law by which the corporation is authorized to act." *Smith v. Cornelius*, 41 W. Va 59, 23 S. E. 599, 30 L. R. A. 747; *McCormick v. Bank*, 165 U. S. 549, 550, 17 Sup. Ct. 433, 41 L. Ed. 817; *Clark Corp.* 174.

As to the claim that Clarksburg has ratified and confirmed this void exclusive feature in the franchise of the electric company by buying from it electricity to light the streets. This is strange doctrine. A void contract cannot be so ratified by mere implication. If the council was without power to expressly grant such exclusive right, it is illogical to say that it can confirm and make it good *ab initio* by mere implication from its dealing with it. Of course, the entire grant is not void, but only the exclusive clause, and the mere purchase by the city from the company of electricity would not ratify the void clause anyhow, because it could purchase under the general power of the company, without reference to that void clause. Ratification and acquiescence cannot be invoked to legalize contracts of a municipality made by its officers in excess of authority, even though the contract has been performed by one of its parties. 2 Mor. Priv. Corp. secs. 621, 718.

The defendant corporations raise the point against the plaintiff corporation that it had no charter existence on the day of the grant to it of the franchise in question, and that, not being *in esse* then, the grant did not vest, but was abortive, like the case of a grant of land to a grantee not in being. I do not think the point tenable. I think the Clarksburg Electric Light Company is vested with a valid franchise, except as to the ex-

clusive feature. In *Spring Garden Bank v. Hurlings Lumber Co.*, 32 W. Va. 357, 9 S. E. 243, 3 L. R. A. 583. It was held that after corporators had signed an agreement preliminary to a certificate of incorporation, and before it had issued, a deed for land to such corporation, delivered in escrow, to be delivered when the corporation should obtain its charter and organize, and it was so delivered after the charter obtained and organization, the deed was good to convey the land. In this case the agreement had not been signed for the formation of the corporation at the date of the town ordinance, and yet I think that ordinance valid. We must not apply the strict rule applicable to deeds of land to the present case. Deeds require actual delivery to a grantee, but such an ordinance as this requires no delivery, only acceptance, and it was accepted by the corporation when it came into legal being. That is enough. I have no doubt that a deed for land made to a corporation named before incorporation, and so dated, but delivered after incorporation, would be good. The date of delivery and acceptance can be shown. It is never a deed until acceptance. *Guggenheimer v. Lockridge*, 39 W. Va. 457, 19 S. E. 874; 5 *Thomp. Corp.*, sec. 5802. The latter authority says that "a deed of conveyance of land to an intended corporation before its organization will take effect upon the event of its organization; for its acceptance of the deed, when it becomes capable of accepting, will be presumed." Much more so in this case, where certain persons intending to form a corporation solicit and are tendered such a franchise as this, and they proceed to become incorporated. It was intended to operate only in the event of incorporation, and when it should take place. No delivery was necessary. Acceptance is all-sufficient to put the ordinance into operation. Then it took effect; not till then. *Richardson v. Graham*, 45 W. Va. 134, 30 S. E. 92.

Our conclusion is to affirm the decree. Affirmed.

NOTE.—See note 2 at end of Part I.

SUBURBAN ELECTRIC LIGHT & POWER COMPANY v. INHABITANTS OF EAST ORANGE TOWNSHIP.

New Jersey Court of Chancery, December 9, 1898.

ELECTRIC LIGHT LINES—MUNICIPAL CONTROL.

An act passed in 1896 authorizes electric light companies to erect poles for wires in highways, except that in incorporated cities and towns permission must be obtained and streets designated. *Held*, that permission could be given by a resolution instead of an ordinance.

That where only the stringing of wires was required, the resolution designating streets need not specify the erection of poles.

That when permission has been given and wires strung in reliance thereon, the company has a franchise, subject only to the police power, not a mere license which may be revoked.

That where permission has been given for the erection of telephone poles, electric light wires may be strung upon them without further permission than that already given for the stringing of wires.

Cases of this series cited in opinion: *Summit Tp. v. N. Y. & N. J. Teleph. Co.*, vol. 7, p.—; *Hudson Teleph. Co. v. Jersey City*, vol. 2, p. 133; *Meyers v. Hudson Elec. Co.*, vol. 7, p. —.

Application for injunction.

C. W. Riker, for complainant.

P. Woodruff, for defendant.

PITNEY, V. C.: The complainant is a corporation organized under the general corporation act for the purpose of supplying electric light and power, and in the exercise of its corporate rights has strung certain electric wires along a street known as Central avenue, within the territorial limits of the defendant, the township of East Orange. The municipal authorities of that town threaten to remove said wires by force, and the object of the bill is to restrain such threatened action. The wires in question are strung upon poles belonging to, and

by the permission of, a telephone company, which poles were erected and are maintained lawfully, and the right of the company so erecting them to maintain the same, so far as the municipality is concerned, is not challenged. It was admitted that the wires are maintained at such a height as not in any wise to interfere with the use of the streets. The right of the complainant to so maintain the wires is based upon the act of May 10, 1884 (P. L. p. 331), which was in substance re-enacted by the act of April 21, 1896 (P. L. p. 322). That act provides that a company like the complainant "shall have full power to use the public roads or highways, streets, avenues and alleys in this State for the purpose of erecting posts or poles on the same to sustain the necessary wires and fixtures, upon first obtaining the consent in writing of the owners of the soil," with a provision that "no posts or poles shall be erected in any street of any incorporated city or town without first obtaining from the incorporated city or town a designation of the street in which the same shall be placed, and the manner of placing the same, and that the same shall be so located as in no way to interfere with the safety or convenience of persons traveling on or over said roads and highways, and that the public streets in any of the incorporated cities and towns of this State shall be subject to such regulations as may be first imposed by the corporate authorities of such cities and towns." The township committee of East Orange, by a special charter, are authorized by subdivision 9 of section 6 of the supplement to the act organizing the township, which supplement was passed March 10, 1873, "to prevent or regulate the erection or maintenance of any awning, stoop, steps, platform, bay window, swinging gate, cellar door, area, descent into a cellar or basement, sign, banner, post or erection or projection of any kind in, over or upon any street or highway or public place, and to remove the same when already erected, at the expense of the owner or occupant of the premises in front of which the same may be." P. L. p. 324. By authority of that section alone, on the 11th

of October, 1886, the township committee passed an ordinance regulating the mode in which telegraph, telephone, or electric light poles should be erected in the city; and the fourth section of that ordinance provides that "all telegraph, telephone or electric light wires shall be placed so as to hang not less than twenty feet above the street crossing over which they are drawn." That is the only provision in that ordinance as to the stringing of wires. On the 19th of February, 1889, the township committee passed an ordinance which provides "that no person or persons shall run or suspend across or through any public street in this township any electric wire, except at railroad crossings, without first obtaining the permission of the township committee." Subsequently, on the 14th of October, 1895, the township committee adopted the following resolution: "Resolved, that consent be, and the same is hereby, given to the Suburban Electric Light and Power Company (the complainant) to erect poles and string wires within this township for electric lighting purposes, subject to all the provisions and restrictions contained in the ordinance of the township, and especially of a certain ordinance entitled 'An ordinance regulating the erection of telegraph, telephone and electric light poles in the township of East Orange,' adopted October 11, 1886: provided, however, that no poles shall be erected within the lines of any accepted street within the township without the further consent of the township committee." It is alleged by complainant, and admitted by the defendant, that Central avenue, along which the wires in question are suspended, is not an accepted street, but is a street within the control and jurisdiction of the Essex county park commission, subject to certain reserved rights in the defendant. Under this resolution the wires in question were strung upon the poles of the telephone company, as we have seen, by its consent. It was held by Vice Chancellor EMOY in *Inhabitants of Summit Tp. v. New York & N. J. Telephone Co.*, 7 Am. Electl. Cas. —, 41 Atl. 146, that the language of the telephone act,

which is substantially the same as that of the electric light act, above cited, gave the telephone corporation the right to string wires over the streets without the consent of, and subject only to proper regulation by, the municipal authorities. The regulation contained in the ordinance of the defendant herein of October 11, 1886, provides only that the wires shall be strung a certain number of feet above the street. No other regulation has ever been ordained. The later ordinance of February 19, 1889, provides that wires shall not be suspended across any street without first obtaining permission of the township committee. That permission was given by the resolution of October 14, 1895. And I am of the opinion declared by Justice REED in *Hudson Telephone Co. v. Jersey City*, 2 Am. Electl. Cas. 133, 49 N. J. Law, 303, at page 307, that a resolution was quite sufficient to give such a permission, and that an ordinance was not necessary for that purpose.

This conclusion renders it unnecessary to consider the debatable questions: (1) Whether or not the authority given by the above recited ninth subdivision of section 6 of the defendant's supplement of March 10, 1873 (P. L. p. 324), authorizing it to prevent certain erections by its true construction included the right to prevent the stringing of wires charged with electricity; or (2) whether, if such authority was given, it was not, in effect, repealed by the act authorizing electric light companies to string their wires, subject to proper regulations by the municipal authorities. Vice Chancellor EMORY in the Summit Tp. Case, above cited, held that a right to regulate did not include a right to absolutely prevent the stringing of such wires. It is urged against the value of the permissive resolution of October 14, 1895, that it is entirely general in its character, and inefficient, because it does not designate any street in which the wires shall be strung. The answer to this is that the provision of the act requiring such designation applies only to the erection of poles, and not to the stringing of wires. This is the necessary result of the decision of Vice Chancellor

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EMERY, above referred to. In support of this position, however, the defendant cites the case of *Meyers v. Electric Co.*, 7 Am. Electl. Cas. —, 60 N. J. Law, 350. But that case relates entirely to the erection of poles, and varies from this in that it was a suit by the State, on the relation of property owners, to set aside an ordinance of the city which had authorized an electric company to set poles generally in any and all of the streets without designating any particular streets, and under that authority the electric company proposed to set poles along the lands of the prosecutors. The ordinance was set aside as against the prosecutors.

It is also urged that the resolution adds nothing to the force of the provisions of the act of the legislature giving general authority to the complainant corporation to string wires over streets. This is true, and it is only necessary to add that the permission given by the act, as we have seen, is quite sufficient of itself to authorize the mere act of suspending wires across the street. No action on the part of the municipal authorities was necessary to authorize it. The true, proper, and only office of the permissive resolution in question was to counteract and suspend, in favor of the complainant, the restrictive effect, whatever that may have been, of the ordinance of February 19, 1889. No right was reserved to the township authorities in the resolution of October 14, 1895, to revoke the same, nor was any limitation fixed upon the time during which the wires strung under it should remain. A resolution rescinding that resolution was, after the stringing of the wires, passed by the municipal authorities, and it is claimed by the defendant that it was authorized to make such rescission, and that, when rescinded, the authority of the complainant to maintain its wires was destroyed. This argument is based upon the ground that the permission was a mere license, revocable at the pleasure of the licensor. I am unable to adopt that view. Considering it as a mere license, it is still a license which has been acted upon, and may not be revoked at the pleasure of the licensor.

In support of this proposition I refer, without citing at length, to the clear and forcible language and reasoning of Justice REED in the case of *Hudson Telephone Co. v. Jersey City*, 2 Am. Electl. Cas. 133, 49 N. J. Law, 303, at pages 305, 306. Moreover, the complainant's right to string the wires does not depend alone, if at all, upon the consent of the municipal authorities; it relates back to the legislative authority to string and maintain the wires upon certain conditions. No time is fixed by the legislative authority for the continuance of the exercise of the franchise, and the grant must be presumed to be perpetual, subject, it may be, as it probably is, to the right of the legislature to exercise upon it its police powers from time to time, as it in its wisdom may see fit.

It is further urged by the defendant that the original grant to the telephone company of the right to erect poles was, by implication, restricted to the right to use them for the purpose of sustaining telephone wires which are of a more harmless character than electric light wires. It is urged that the latter are dangerous in their nature, and that the grant to erect the poles should be construed as restrictive in that respect. I am unable to adopt that view. The dangerous character of the wires must be presumed to have been in the mind of the legislature when it gave the general power above referred to. The poles are the private property of the telephone company, and they have a right to use them as they choose, so long as they do not maintain a public nuisance. If they are too small to bear the weight that is put upon them, or have become weak from age, it is probably within the power of the municipality to order them to be replaced, and made safe. And the case, in my judgment, must be viewed precisely as if those poles stood upon private ground, as was the fact in the Summit Tp. Case, above cited. The rights of the owners of the soil which supports the poles upon which the wires in question are strung are not here brought in question. They are quite distinct from the rights of the public in the street, and cannot, in my judgment, be invoked by the defendant in support of its proposed action, for the simple and

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all-sufficient reason that it is not within the scope of the power of the defendant to enforce those rights. The proposed action of the common council is probably excited by a desire to compel the electric light company to place its wires under ground. It is not intended by this decision to intimate any opinion as to the power of municipal authorities, under the present state of the law, to bring about that result by proper municipal action. I will advise an order that an injunction do issue pending the suit.

NOTE.—See note 2 at end of Part I.

WYANDOTTE ELECTRIC LIGHT COMPANY v. CITY OF WYANDOTTE.

Michigan Supreme Court, May 15, 1900.

(124 Mich. 43.)

ELECTRIC LIGHT COMPANY—REVOCATION OF FRANCHISE.

Where a municipality had granted to an electric light company the right to erect and maintain poles and wires in its streets, and the company had operated under such franchise for several years, the municipality was estopped to revoke its franchise upon the ground that the company had not been incorporated under the electric lighting act and that the municipality had no power to grant the franchise originally.

Cases of this series cited in opinion: *Michigan Teleph Co. v. St. Joseph*, vol. 7, p. 1; *Mich. Teleph Co. v. Benton Harbor*, vol. 7, p. 9; *Detroit City Ry. Co. v. Mills*, vol. 3, p. 333.

Appeal by defendant from a decree of the Circuit Court of Wayne county, granting plaintiff an injunction.

The complainant was organized September 19, 1889, with four incorporators. Its articles of association recited that it was incorporated under Act No. 232, Pub. Acts 1885, as amended by Act No. 170, Pub. Acts 1889, entitled "An act to

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revise the laws providing for the incorporation of all manufacturing companies (except such as are contemplated by Act No. 42 of the Session Laws of 1867, which provides for the incorporation of persons or corporations engaged in the manufacture of salt), and mercantile companies or any union of the two, and to fix the duties and liabilities of such corporations." Its declared purpose was the manufacture and supply of electricity for power, heating, and lighting purposes. Its capital was \$25,000, and its term of existence fixed at thirty years. On September 25th it addressed to the mayor and common council of the city of Wyandotte the following communication: "Gentlemen: We, the undersigned, a body corporate under the laws of the State of Michigan, do most respectfully request your honorable body to grant us a franchise to erect and maintain poles and wires through the streets of Wyandotte under the direction of the committee on streets, and your petitioners will ever pray," etc. The records of the common council show that "on motion of Alderman Gartner, the prayer of petitioner was granted, by the following vote: Ayes, 7; nays, none." Under the franchise thus conferred the complainant had, until the filing of this bill, September 12, 1898, continued to enjoy its plant, and extend its services to the inhabitants of defendant city. This extension had been made by the acquiescence of the city, without any further action or any attempt upon its part to control the location or erection of poles. Complainant then had about 1,700 lights, and was engaged in extending its poles and wires quite extensively to other parts of the city. On August 4, 1898, the common council passed a resolution directing the city clerk to notify complainant to remove from the streets and other public places of the city all unused electric wires, all unused hoods, appliances for electric lights, and all other unused electric wiring appliances within ten days from the date of the passage of the resolution. It further instructed the clerk to notify complainant to remove all electric wires that are not properly insulated, and all from which the insulation had been worn or removed, within ten days from the passage

of the resolution. This notice was served on August 5th. At the time this action was taken, complainant was engaged in removing these unused wires, hoods, and appliances. It continued such removal after receiving such notice, and claims to have complied therewith as far as practicable. On August 17, 1898, the common council adopted a resolution revoking and canceling "all previous licenses, permissions, or other rights of said common council giving complainant permission or authority to erect poles, wires, etc., in the streets, alleys, and other public places of the city, until it secures from the common council a franchise or ordinance, giving it permission and authority so to do." This notice was duly served. Complainant replied, insisting upon its rights; that the action of the common council was null and void, but saying that, if the council would present the terms of the proposed new agreement it would be glad to consider it, in the hope that the matter would be disposed of satisfactorily to both parties. To this communication the defendants made no answer, and, after waiting ten days, complainant filed this bill, claiming that it had a contract with the city co-extensive with its life, subject to the reasonable regulations of the common council with reference thereto, and praying for an injunction restraining the proposed action of the defendants. The defendants answered, claiming the benefits of a cross bill, insisting that the petition and action of the common council in 1889 created a mere license, revocable at the will of the defendants; that such license was revoked by the resolution of August 4th, and praying that complainant be decreed to remove its poles and wires from the streets, and be restrained from any further use thereof. The case was heard upon pleadings and proofs, taken in open court, and decree entered for the complainant.

Charles H. Marr (Elliott G. Stevenson and Robert F. Eldredge, of counsel), for appellants.

Edwin F. Conely and Orla B. Taylor, for appellee.

GRANT, J. (after stating the facts): There is one controlling question in the case. Upon its determination depend the rights of the parties. It can, perhaps, be better stated by stating the several contentions. The defendants contend that complainant, by organizing under the general manufacturers' act, obtained no franchise direct from the legislature to use the streets and highways, such as it would have acquired under the electric light companies' act. Their second contention results from the first, namely, that the city had no authority to grant the franchise claimed by complainant. The complainant contends: (1) That the defendant city cannot make this collateral attack upon its act of incorporation; that the State had for nine years recognized the validity of its incorporation, and that the State alone is the party which can complain. (2) That the city is estopped to claim in this suit that the complainant ought to have been organized under some other statute, or ought not to have exercised the franchise of manufacturing and vending electric light to its inhabitants. If complainant were organized under chapter 190, Comp. Laws, entitled "Gaslight Companies," it would be clearly entitled to the relief asked. It would come within the doctrine enunciated in *Michigan Telephone Co. v. City of St. Joseph*, 7 Am. Electl. Cas. —, 121 Mich. 502 (80 N. W. 383, 47 L. R. A. 87), and *Michigan Telephone Company v. City of Benton Harbor*, 7 Am. Electl. Cas. —, 121 Mich. 512 (80 N. W. 386, 47 L. R. A. 104). Section 7141, Comp. Laws, expressly gives to electric light companies the authority "to lay, construct and maintain conductors for conducting electricity through the streets, alleys and squares of any such city, town or village, with the consent of the municipal authorities thereof, under such reasonable regulations as they may prescribe; and such corporation may make all such contracts and by-laws as may be deemed necessary and proper to carry into effect the foregoing powers." By this statute electric light companies are given the same rights in the streets as are telephone companies when the assent of the mu-

municipality is obtained. An incorporation under this act, a petition to the city to erect poles and wires, or for a franchise for that purpose, and the grant of the same by the city, would make a contract binding for the life of the corporation. It would be immaterial that no time for the existence of the right of the franchise was specified. The grant in such case would be limited to the period of existence fixed by the charter. If a railroad company were organized for a period of thirty years, and a party, natural or corporate, should grant it a right of way without specifying the time of user, the grant would be for the lifetime of the corporation. The law would imply that both parties contracted with reference to its period of existence. The same rule is applicable here. *St. Clair County Turnpike Co. v. Illinois*, 96 U. S. 63, 68. The purposes for which complainant was organized are precisely these covered by the electric lighting act. It could not carry on its proposed business without the use of the streets, and immediately applied to the city for such use. The city so understood it. That the inhabitants of a municipality should be supplied with light is as essential as that they should be supplied with water and telephones. They are all recognized by the law as necessary, made so by modern methods of living and business. The people of the State, through their legislature, have so determined by authorizing the formation of corporations for these purposes. Whether the defendant city knew under what act complainant was organized does not appear. Why complainant organized under this act is unexplained. No good reason appears or is suggested for its doing so. The only reasonable excuse is that somebody blundered. Whether the act under which it was organized would permit its incorporation, we need not determine. The State for nine years recognized its incorporation as valid. The defendant city dealt with it for the same time as a valid corporation, granted it the franchise as requested, permitted it to erect and maintain an extensive plant; and now, when the city has gone into the business of municipal and commercial

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lighting, seeks to crush it, to utterly destroy its property, and compel its patrons to become the patrons of the city, which charges more for its service than does complainant. It is needless to say that defendants are without equity, and that their contention ought not to prevail, if the courts of equity have the power to prevent it. We are of the opinion that the defendants are not in a position to raise the question of lack of power in the complainant, and that that question is one which the State alone can raise. *Detroit City Railway v. Mills*, 3 Am. Electl. Cas. 333, 85 Mich. 634 (48 N. W. 1007), and authorities cited in paragraph 2 of the opinion, page 647. Where national banks have exceeded their authority in taking securities, the United States Supreme Court held that the parties interested could not complain so long as the government did not. *Bank v. Matthews*, 98 U. S. 621; *Bank v. Whitney*, 103 U. S. 99. Applying the same rule to this case, defendants cannot complain so long as the State does not. The contract is not *ultra vires* the corporation, but, on the contrary, is one expressly authorized by the statute above cited and the charter of the city. It now seeks to interpose a mere technicality to destroy a valuable property. This courts of equity will not permit. "A court of equity is always reluctant to the last degree to make a decree which will effect a forfeiture." *Bank v. Matthews*, 98 U. S. 621. The common council are authorized to enact reasonable rules and regulations for the erection and maintenance of the poles and wires, and to compel the removal of those that are dangerous. This authority is fully defined in the telephone cases above cited.

Decree affirmed. The other justices concurred.

NOTE.—See note 2 at end of Part I.

THE STATE, SAMUEL I. MEYERS ET AL., PROSECUTORS, v. THE
HUDSON COUNTY ELECTRIC COMPANY AND THE CITY OF BAY-
ONNE.

New Jersey Supreme Court, June 3, 1897.

(60 N. J. L. 350.)

ELECTRIC LIGHT FRANCHISE—DESIGNATION OF STREETS.

(Head-note by the Court):

Because of the act of April 21, 1896 (Pamph. L. p. 322), electric light companies cannot lawfully erect poles in any street of a city, for either public or private lighting, without first obtaining from the city a particular designation of the streets in which the same are to be placed.

Certiorari.

Van Buskirk & Parker and *C. L. Corbin*, for prosecutors.

T. N. McCarter, Jr., for defendant Hudson County Electric Company.

T. F. Noonan, Jr., for defendant City of Bayonne.

DIXON, J.: The object in suing out this writ of certiorari is to test the right of the Hudson County Electric Company to place poles along Thirty-third street and Avenue C, on the land of the prosecutors, for the purpose of supplying electricity to three electric lights on the northeasterly corners of Avenue C and Thirty-second, Thirty-third, and Thirty-fourth streets, in the city of Bayonne, pursuant to a resolution of the city council passed November 8, 1896. The prosecutors insist that these poles cannot lawfully be erected, because the city has never designated Thirty-third street and Avenue C as streets in which such poles might be placed, as required by the act relating to electric light, heat, and power companies, approved April 21, 1896 (P. L. 1896, p. 322). That no such designation has ever been obtained is clear. The control of the streets is vested in

the city council, and the only act of that body which, it is suggested, might be deemed a designation under the statute cited or its predecessors (P. L. 1884, p. 331, and P. L. 1893, p. 412), is an ordinance approved January 15, 1895, purporting to authorize the Hudson County Electric Company to erect poles "in all the public roads, public places, highways, streets, avenues and alleys of the city" for electric light, heat, and power purposes. If circumstances should exist in which an electric company proposed to erect poles at once throughout every public street in a city for the purposes stated, such an ordinance as this might be considered a sufficient compliance with this statutory prerequisite. But when, as in the case before us, neither the city nor the company intended the immediate prosecution of so general a work, an ordinance of this character was a mere evasion of the law. To give it effect would be to authorize the company, instead of the city, to designate the streets in which poles were to be placed, whenever, in the judgment of the company, a proper occasion should arise. If, then, a designation of streets by the city under this law was a necessary preliminary to the erection of these poles by the company, we must conclude that this resolution, which leaves the whole plan of construction to the discretion of the city surveyor, is illegal.

The defendants contend that the law only requires a designation of streets by the city when poles are to be erected for private lighting, and that when, as here, the purpose is to light the public streets, this statute does not apply. We cannot concur in this view. It presupposes an expectation on the part of the legislature that these companies would generally erect one line of poles for public lighting, and another for private lighting. Such an expectation would be antagonized by common experience, and we find no adequate reason for believing it was entertained. The language of the statute on this point is unambiguous, and in its plain meaning leads to no absurd or even unreasonable result, and, therefore, that meaning should be enforced. *Rex v. Commissioners*, 6 Adol. & E. 7; *Water Commissioners v.*

Brewster, 13 Vroom, 125, and cases there cited; *Earle v. Willets & Co.*, 27 id. 334. Our opinion is that no company of the class mentioned in this statute has any lawful power to erect its electric poles in any public highway, except in accordance with the terms of this act.

But the defendants further urge that the resolution can be supported on the "Act authorizing the lighting of public streets and places in the cities, towns, townships, boroughs, and villages of the State, and to erect and maintain the proper appliances," approved May 22, 1894. Pamph. L. p. 477. This statute relates wholly to municipal corporations, and it is manifest that the authority granted by it cannot be curtailed by the act of April 21, 1896, which, both in its title and in its enacting clauses, is confined to electric light, heat, and power companies. But this statute is not applicable to the present question. The power which it delegates is conferred only on the municipal bodies described in it. If the city of Bayonne, by its own agents, were erecting its own poles in these streets, for the purpose of lighting streets, the statute of 1894 would be in point; but it cannot be invoked as legal sanction for any attempt on the part of the city to authorize an electric light company to erect its poles in the streets, without complying with the act of 1896. The poles to be erected under the act of 1894 are public property, to be used only for public purposes. The poles to be erected under the act of 1896 are private property, to be used for public or private purposes. The ordinance of January 15, 1895, is illegal, and must be set aside, except so far as it has been acted upon by the Hudson County Electric Company, with the acquiescence of the city and the owners of the soil affected. The resolution of November 8, 1896, is also illegal, and must be set aside.

The prosecutors attack a contract made January 8, 1895, between the city and the United Gas Improvement Company, which was executed also by the Hudson County Electric Company and others. It is doubtful whether the certiorari brings

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this contract under review, but, even if it does, some of the parties interested in it are not before us; and, as it imposes no obligation on the city in the matter now complained of, its legality need not and should not be considered.

The prosecutors are entitled to costs.

NOTE—See note 2 at end of Part I.

MICHIGAN TELEPHONE COMPANY V. CITY OF CHARLOTTE.

U. S. Circuit Court, W. D. Michigan, S. D., April 11, 1899.

TELEPHONE PRIVILEGES OF POST ROADS ACT SUBJECT TO LOCAL POLICE POWER
—CITY CANNOT DEPRIVE ITSELF OF SUCH POWER BY CONTRACT.

A telephone company claiming that its contract right to use streets is violated by a subsequent municipal ordinance, presents a Federal question of which this court has jurisdiction.

The privileges conferred upon telegraph companies by the post roads act of Congress are subject to the police powers of the city whose streets they occupy, in the interest of the public safety.

So is any contract made by a municipality with an electrical company using its streets, and such permission may be modified or the location of the lines directed changed.

An ordinance requiring the removal of telephone lines in a certain street, but offering another location which is a reasonable substitute, is legitimate, and not unconstitutional.

In equity. On motion for preliminary injunction.

Wells, Angell, Boynton & McMillan, for complainant.

James M. Powers and Garry C. Fox, for defendant.

SEVERNS, D. J.: The bill in this case was filed by the complainant, the Michigan Telephone Company, against the city of Charlotte, to restrain it from enforcing an ordinance requiring the company to transfer its poles and wires from where

they stand, in front of blocks 24 and 31, on Main street, in said city, to the alley next adjoining said street, and running parallel therewith. This ordinance was passed upon the grounds that the poles now standing and supporting the wires along said street are decayed to such an extent that they have become inadequate to the support of the system of wires which they carry, and also that the company has accumulated on said poles a great number of wires, which it employs in the conduct of its business, and to such an extent as to endanger the life and safety of the citizens of said city, and others occupying the buildings on said street or traveling therein. The power of the common council to order such a transfer is denied by the complainant, which alleges that while its poles are defective, and the system needs repair in that respect, it proposes to substitute new and sufficient poles in place of the old, and in this respect stands ready to comply with the requirement of the ordinance. But the complainant denies that the wires strung upon its poles constitute any menace to the lives or safety of the public, and alleges that the transfer of its poles and wires to the adjoining alley would be attended with considerable expense and inconvenience, and that the common council transcended its authority when it ordered such transfer. In addition to its answer, the city has submitted several affidavits in support thereof; and the substance of the case set up in its behalf is not only that the poles are inadequate, but also that, independently of this, the multitude of wires strung thereon creates a condition of danger which it is the duty and right of the common council to obviate by directing the transfer of the company's lines to the adjoining alley, which is much less frequented by the public, and where the danger would be greatly minimized.

The company introduced its telephone system into the city of Charlotte in the year 1883, under the authority of section 3718d, 3 How. Ann. St., which reads as follows:

"Every such corporation shall have power to construct and maintain lines of wire or other material, for use in the transmission of telephonic messages

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along, over, across, or under any public places, streets and highways, and across or under any of the waters in this State, with all necessary erections and fixtures therefor; provided, that the same shall not injuriously interfere with other public uses of the said places, streets, and highways, and the navigation of said waters."

The charter of the city of Charlotte contained the following provision delegating the supervision and control of its streets to the city:

"The common council shall have supervision of all public highways, bridges, streets, avenues, alleys, sidewalks, and public grounds within the city, and shall cause the same to be kept in repair and free from nuisance." Loc. Acts 1895, p. 198, sec. 170.

This clause of the charter was in force at the time when the complainant introduced its system into the city, and still remains operative. It is sufficiently shown that the city gave its consent to the original construction of the telephone system along the streets of the city,—among them, Main street, where the poles and lines have since continued. It is also clear enough that the proposed transfer from Main street to the alley could be made without any very considerable expense; the change involving eight or ten additional poles, increasing the length of the wires to the extent of crossing about two blocks, and perhaps some minor incidental material for making connections.

The defendant, the city of Charlotte, contends that no case is stated by the bill which brings it within the jurisdiction of the Federal court. Several grounds for jurisdiction are relied upon by the complainant,—among them, this: That the introduction of the telephone system and service by the complainant into the city of Charlotte, with the acquiescence and concurrence of the city, and the incurring of the cost of the construction and maintenance of the system, created a contract that the company might take and retain possession of the streets which it used, and that this contract was impaired by the passage of the ordinance complained of. This is the claim made by the complainant, and, if made in good faith, it affords sufficient ground for

the exercise of jurisdiction under that clause of the constitution of the United States which forbids the impairment of the obligation of contracts by State legislation. *City of New Orleans v. New Orleans Waterworks*, 142 U. S. 79; *City Railway Co. v. Citizens' St. R. Co.*, 166 U. S. 557. And there is no reason to doubt the *bona fides* of the company in making this claim.

Counsel for the complainant supports its claim upon the merits on several distinct grounds:

1. It is insisted that the action taken by the common council violates the provisions of section 5263 of the Revised Statutes of the United States, which provides that any telegraph company shall have the right to construct, maintain, and operate lines of telegraph over and along any of the post roads of the United States, or which may hereafter be declared such by law, and such lines of telegraph shall be so constructed and maintained as not to interfere with the ordinary travel on such post roads; and it is claimed that Main street, in the city of Charlotte, is such post road, and, further, that this company is a telegraph company, within the meaning of the statute,—citing in support of this latter proposition *City of Richmond v. Southern Bell Telegraph & Telephone Co.*, 28 C. C. A. 659, 85 Fed. 19, and the cases relied upon by the court in deciding that case. It is urged that this provision of law confers upon the complainant the right to occupy any street in the city of Charlotte which is a post road, without let or hindrance from the common council. But in my opinion the statute has no such effect. It is permissive merely, and the power is given subject to other lawfully existing rights,—among them, that of the State and its municipalities to exercise police powers for the safety, health, and convenience of the public. In my opinion, it was not the intention of Congress to arbitrarily disturb or interfere with the exercise of the police powers of the State. A statute giving such authority would be anomalous, and, indeed, of doubt-

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ful validity. It is a rule of general application that legislation by Congress in respect to all such matters, conferring rights and privileges, is deemed to be subject to local legislation enacted for the purpose of regulating the exercise of such rights and privileges so as to protect the citizens of the State in respect to those matters which fall within the scope of the police power. Of course, it is not intended to say that the local authority may arbitrarily interfere with such rights and privileges, and, under the guise of its conceded authority, enact legislation which is really designed to accomplish some ulterior purpose beyond the scope of its legitimate power.

2. It is further contended that the action of the common council of the city constitutes an unlawful interference with commerce between the several States. Assuming that this rule applies to telephonic communication as a means of such commerce, it is to be observed that the clause in the constitution which gives to Congress the control of interstate commerce does not preclude the exercise of power in the State to impose regulations designed for the safety of the local public. *Sherlock v. Alling*, 93 U. S. 99; *Smith v. Alabama*, 124 U. S. 465; *Kidd v. Pearson*, 128 U. S. 1; *Plumley v. Massachusetts*, 155 U. S. 461; *Patapsco Guano Co. v. North Carolina Board of Agriculture*, 171 U. S. 345.

3. It is also urged that the ordinance of the common council amounts to an impairment of the obligation of the contract between the complainant and the city. But here, again, assuming, as we do, that the contract exists, it is well settled that, with respect to contracts of this character, they are subject to such incidental modification as results from legislation required in the public interest. It is a fundamental proposition that the legislature cannot deprive itself, by contract, of the power to pass such laws as are necessary for the general welfare of the public. Prominent among the kinds of legislation which may be enacted for that purpose are such as are designed for the public safety and convenience. *New York & N. E. R. Co. v. Town of Bristol*,

151 U. S. 556; *Wabash R. Co. v. City of Defiance*, 167 U. S. 88; *Chicago, B. & Q. R. Co. v. Nebraska*, 170 U. S. 57.

4. It is also said that the action of the common council deprives the complainant of its property without due process of law. This assumes that the complainant has a vested right to occupy this particular street. But this position is untenable. The city was required, when it admitted the complainant to its streets, to consider the public interests, in defining in what particular streets the lines might be located. The then existing conditions might have made it proper that this street should be so used. But the construction of buildings on the street, and the multiplication of wires, may have rendered it now imprudent that they should remain. The same duty of provident supervision on the part of the city continues to rest upon it. If there was any vested right in the privilege which was accorded by the city to construct and maintain telephone lines in the streets, it is a privilege which must continue in subordination to the strictly legislative action of the city which it exercises in respect to the matters delegated to it by the legislature for the public welfare. *Northwestern Fertilizing Co. v. Village of Hyde Park*, 97 U. S. 659; *Railroad Co. v. Gibbs*, 142 U. S. 386-393; *Banking Co. v. Smith*, 128 U. S. 179; *Coates v. Mayor, etc.*, 7 Cow. 585.

Indeed, each and every of the grounds upon which the complainant relies is negatived by the application of one general proposition, which is that the city, being vested by the legislature with the power of supervision and control of its streets in the manner and to the extent in which that power is given by its charter, has the authority to make such a requirement as it made by the ordinance in question, provided it was made in good faith, and can fairly be seen to be directed to a legitimate purpose falling within the purposes of the delegated authority. As has been already said, if this action of the common council was purely arbitrary, and had no fair tendency in the direction of the public safety, the result would have been different. If power exists, and the exercise of it is not clearly in disregard of its proper bounds, the court is not authorized to determine the

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validity thereof by its own sense of the wisdom or expediency of the action taken, nor weigh in a nice balance the question of its justice in a general sense. 7 Am. & Eng. Enc. Law (2d Ed.) p. 676, and cases therein cited. In my judgment, there is no sufficient ground upon which the court would be warranted in holding that the common council in this instance transcended its power. It does not exclude the telephone company, but regulates the details of its operations in the service rendered, by requiring it to change the location of this line to a near-by place in the city. And this does not impose a duty so burdensome as to excite any apprehension that serious hardship is inflicted. It may be that the city cannot compel the company to erect its poles and stretch its wires in the alley; but it has the power, if the necessity therefor exists, to compel the discontinuance of the use of Main street, and in doing this it is bound to provide, if practicable, a reasonable substitute therefor. This it has done. The result is that the motion must be denied. Let an order be entered accordingly.

NOTE.—See note 2 at end of Part I.

THE INHABITANTS OF THE TOWNSHIP OF SUMMIT V. THE NEW YORK & NEW JERSEY TELEPHONE COMPANY.

New Jersey Court of Chancery, August 12, 1898.

(57 N. J. Eq. 123.)

TELEPHONE LINES.—MUNICIPAL CONTROL.

Under a statute authorizing telephone companies to use streets and highways "subject to such regulations and restrictions as may be imposed by the corporate authorities of incorporated cities and towns,"

Held, (1) That the township of Summit is an incorporated town; but (2) That an ordinance prohibiting the stretching of wires across streets with-

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out the consent of the township authorities is not a regulation within the meaning of the statute.

The case of *American Union Tel. Co. v. Town of Harrison*, 1 Am. Electl. Cas. 291, is controlling upon the proposition that under the statute in question a telegraph company erecting its poles on private property, with the consent of the owners, has, in the absence of a municipal regulation, a legal right to cross the streets with its wires at a proper elevation. Other cases of this series cited in opinion: *Broome v. N Y. & N. J. Teleph. Co.*, vol. 2, p. 259.

Application for preliminary injunction.

C. N. Williams and *R. V. Lindabury*, for complainant.

C. L. Corbin, for defendant.

EMERY, V. C.: The bill in this case is filed by the inhabitants of the township of Summit to enjoin a telephone company from running its wires over certain of the public streets of the township. The poles upon which the wires are suspended are not located in the public streets, but upon private property, by consent of the owners; and, as appears by the defendant's affidavits, where the wires cross streets the consent thereto of the owners of the land abutting on the street at the place of crossing has been obtained. The wires crossing the street are suspended at an elevation which does not interfere with public travel on the streets. The present application is for a preliminary injunction restraining the further erection of poles or suspension of wires across the street pending the hearing, and also for a mandatory injunction requiring the removal, pending hearing, of the wires already erected, but, on the motion, mandatory injunction was not asked. The right of the township to enjoin the suspension of wires across the public streets is based upon the claim that, under the statute relating to telephone companies and the ordinance passed by the township authorities under its authority, the telephone company has no right to suspend its wires across the public streets without the consent of the township committee, and that this consent has not been given. If the statute does require such previous consent, then, under the decisions of this

court, this statutory right may be assured to the township by a preliminary injunction, which is the only method of enforcing it. *Franklin Tp. v. Nutley Water Co.*, 53 N. J. Eq. 601; *Stockton v. Railroad Co.* (McGill, Ch.; 1895) 53 N. J. Eq. 418.

The main question on this application is whether the company is required, either by statute or ordinances made thereunder, to obtain the previous consent of the township authorities to suspend its wires across the streets. The "act relating to telephone companies" (Gen. St. pp. 3458, paragraphs 9, 24; 3461), provides that:

"Any telephone company organized under the act shall have full power to use the public roads and highways in the State on the line of their route for the purpose of erecting posts or poles on the same to suspend the wires and other fixtures, upon first obtaining the consent in writing of the owner of the soil; provided, however, no posts or poles shall be erected in any street of any incorporated city or town without first obtaining from the incorporated city or town a designation of the streets in which the same shall be placed and the manner of placing the same, and that the same shall be so located as in no way to interfere with the safety or convenience of persons traveling on or over the said roads and highways, and that the use of the public streets in any of the incorporated cities and towns of this State shall be subject to such regulations and restrictions as may be imposed by the corporate bodies of said cities or towns."

The ordinance passed by the township committee in relation to wires provides that:

"No wire shall be stretched across any public street, avenue or highway in said township, nor laid under the soil of any public street, avenue or highway, without the permission of the township committee."

No ordinance has been passed regulating in any other manner the use of the streets of the township for wires. Two questions arise under this statute and ordinance: First, whether the complainant is an incorporated town, within the meaning of the statute giving to such towns the right of regulation of the use of the streets; and, if so, then, second, whether the ordinance in question is a regulation of the use of the streets, within the meaning of the statute. Both questions must be answered in

the affirmative in order to sustain complainant's right to an injunction, for the case of *American Union Teleph. Co. v. Town of Harrison* (Van Fleet, V. C.; 1879), 1 Am. Electl. Cas. 291, 31 N. J. Eq. 627, is a controlling decision in this court, made directly upon the point, and to the effect that under this statute, and in the absence of a regulation by the municipal authorities for the use of wires across streets, a telegraph company erecting its poles on private property, with the consent of the owners, has a legal right to cross the street with its wires, at a proper elevation above the street.

The township of Summit was created by special act, March 23, 1869 (P. L. 538); and its inhabitants, on incorporation, were invested with the general powers of other townships in the county of Union. No special powers other than those conferred upon townships in general have been granted, and the defendant therefore contends that the township cannot be considered an "incorporated town," under the statute in question. The Supreme Court, however, in a case where the point was directly involved, and was the preliminary question, held that the word "town," as used in this act, should receive an interpretation broad enough to include municipalities formally styled townships, boroughs, or villages, where the public highways were in fact streets, as distinguished from country roads. *Broome v. Telegraph Co.* (1887), 2 Am. Electl. Cas. 269, 49 N. J. Law, 624. The judgment in this case was affirmed on error, but the court, in affirming, expressly reserved decision upon this point. 50 N. J. Law, 432, 434. This reservation by the appellate court is relied on by defendant's counsel as limiting the controlling effect of the judgment of the Supreme Court now in question, but I cannot so regard it. The reservation undoubtedly has, and was intended to have, the effect of leaving the appellate court itself free to examine the question *de novo* hereafter, when thought necessary; but the correctness of the decision below was not expressly questioned or declared to be doubtful, and therefore, as it seems to me, the decision of the Supreme

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Court must by this court still be considered as a decision by a court of co-ordinate jurisdiction directly upon a point involved. Under the general rule of comity of our courts, such decision of a court of co-ordinate jurisdiction should be followed (*Palmer v. Johnson* [Brett, M. R. ; 1884] ; 13 Q. B. Div. 351, 355) ; and there is nothing in the present case to withdraw it from the operation of this general rule. For the purposes of the present application, I shall therefore apply the test laid down by the Supreme Court in *Broome v. Telegraph Co.* as to the character of the complainant corporation. The affidavits sufficiently show that the highways of the township of Summit, or at least the highways now involved, are streets of a town, and not country roads ; and I therefore hold that the township has the power under this act to regulate the use of these streets at the crossings in question.

The second question raised is whether the ordinance requiring the previous consent of the township committee to the suspension of wires across the streets is a regulation of the use of the streets, within the statute. The statute itself, which is the only foundation of the right of the township to pass any ordinance on the subject, has not imposed the condition requiring such previous consent, nor does it expressly confer upon the township the right to prohibit or prevent the use of the streets. A right to prevent the use of the streets for suspending wires, unless previous consent is obtained, if such a right be lawfully conferred, authorizes a refusal to consent at discretion, and confers a virtual power of prohibition. The right to the use of the streets has been expressly granted by the legislature, and the power to prohibit or interdict this use so granted cannot be inferred from the declaration in the proviso annexed to the grant that the use should be subject to such regulations and restrictions as may be imposed. The restrictions intended in such a proviso must be held to be restrictions in the nature of regulations, and not restrictions which shall prohibit the use or impose new conditions to the power to exercise the franchise. A power

to "regulate and control" the driving of cattle in streets does not give power to prevent it altogether. *McConwill v. Jersey City* (Sup.; 1876), 39 N. J. Law, 38, 44. Such power of prohibition or of imposing conditions upon which the franchise should be exercised at all was not vested in the township authorities by the statute, nor can the township committee, by its own ordinance, confer upon itself this power, or the absolute right of previous consent. An ordinance imposing a new condition upon which the telephone company may use its franchise in or over the public streets, granted by the legislature, is an entirely different thing from an ordinance regulating and restricting the manner of erection and use in or over the streets. The effect of such ordinance is to interdict the enjoyment by the company of its franchise, except upon terms and conditions which the legislature, in its charter, has not imposed. This is the language of Mr. Justice DEPUÉ in *North Hudson Co. Ry. Co. v. Hoboken*, 41 N. J. Law, 71, 75, in reference to an ordinance requiring a license from the city as a condition of running cars, where no authority to require such license has been conferred; and the same principle seems to me to be applicable here. Counsel for the complainant rely upon the opinion of Mr. Justice DIXON in *Home Teleph. Co. of New Brunswick v. Common Council of New Brunswick*, as indicating that in reference to the construction of a local system of telephones, such as is involved in this case, the municipal authorities have an absolute discretion. But this decision was upon the question whether, under the telegraph and telephone act, the municipal authorities could be compelled to make a designation of public streets in which the poles could be located for a local system. The court held that such designation of streets to be used was compulsory only for the through route of the company, but the decision does not, in my judgment, reach the present question. In the present case the telephone company, having erected its poles for its local system, not on the public streets, but on private property, and with the consent of the owners of the soil, does not require any desig-

nation or use of the public streets for the erection of its poles. The right of the company to the use of the streets for the mere suspension of wires over them is based on the authority expressly given by the legislature to use the highways for erecting poles to sustain wires, and the consent of the owner of the soil; and this use is not by the statute made subject to the mere discretion of the municipal authorities. They can only regulate and restrict it by reasonable regulations. Another case (*Consolidated Traction Co. v. East Orange Tp.*, 61 N. J. L. 202), was also relied on to sustain the ordinance as a regulation. In this case an ordinance which provided that "no person should trim, cut or break any tree, limb or twig thereof," etc., "without first obtaining permission of the township committee, or their authorized agent," was sustained as valid and reasonable. But the township in this case had express legislative authority "to authorize and prohibit the removal or destruction of trees," and the ordinance against removal or destruction without previous consent was therefore no extension of their power of prohibition, but a limitation of it; and, besides, the subject-matter of the ordinance, viz., the removal of trees, etc., was one of such character that the provision for the consent of the committee or its authorized agent, in each particular case of removal, was a reasonable regulation, and perhaps the only practical regulation that could be made. Neither of these considerations, on which the decision was based, is applicable in the present case. I conclude, therefore, that this ordinance in question is not a "regulation and restriction," under the statute, and that the complainant has therefore failed to show any right to a preliminary injunction, on the basis of the protection of a statutory right of previous consent. There being no interference with the public travel or use of the streets, there can be no preliminary injunction upon that ground, and the application is therefore denied.

NOTE.—See note 2 at end of Part I.

STATE EX REL. NEW YORK & NEW JERSEY TELEPHONE COMPANY V. MAYOR AND COMMON COUNCIL OF BOROUGH OF BOUND BROOK.

New Jersey Supreme Court, March 11, 1901.

DESIGNATION OF TELEPHONE ROUTE.—DELEGATION OF LEGISLATIVE POWER.

(Head-note by the Court):

A delegation of power by the legislature to the Circuit Court to designate a route for a telephone line through a municipality, in case the municipal authorities do not upon application make the designation within fifty days, is improper and void.

An application for the designation of a route for a telephone line part way through a municipality, where the part applied for connected other parts of a through line, is within the acts of the legislature of 1880, 1887, and 1888, relating to telegraph companies.

The act of 1900 (P. L. p. 74), does not confer any discretion upon the municipality upon application to designate a route for a through line.

Application for mandamus.

Corbin & Corbin, for relator.

William F. Vossler and Alan H. Strong, for defendant.

GARRETSON, J.: This is an application for a mandamus upon the mayor and council of Bound Brook to designate a route for a telephone line through the borough. In the case of *Home Teleph. Co. v. City of New Brunswick*, 62 N. J. Law, 172, where an application was made for a route through various streets of the city, the court says: "If we could regard the petition as requesting merely the designation of a continuous route for a line through the city, we would have no doubt of the duty of council to grant it." "The basis on which such a duty is claimed to rest is found in the telegraph companies acts, approved March 11, 1880, April 1, 1887, and April 27, 1888 (Gen. St. p. 3459)." "Of these, we think the last only is now

operative; for, in our judgment, it has superseded the previous statutes." "The first section of the act of 1887 was plainly but a substitute for, and extension of, the first section of the act of 1880; for, except as it broadened the scope of the law, it adopted the very words of the earlier act, and covered the same ground. Then came the act of 1888, which is in terms an amendment of the act of 1887, and so, of course, takes its place."

It is admitted by the counsel of the complainant that the delegation of power to the Circuit Court in the act of 1887 to designate a route, in case the common council does not make the designation within fifty days, is improper and void, and for that reason application for mandamus is made to this court. The counsel for the borough claim that this delegation of power to the Circuit Court is void, and renders the entire act unconstitutional. We think that the act of 1888 contains an improper delegation of power to the Circuit Court, and in that respect is void (*Mayor, etc. v. Lord*, 61 N. J. Law, 136), but we do not think that this renders the rest of the act unconstitutional. In the case of *Home Teleph. Co. v. City of New Brunswick*, *supra*, it is to be noticed that it did not appear to be claimed that the company's remedy for the city's failure to act was by application to the Circuit Court, but that requirement was disregarded, and application made to the Supreme Court for a mandamus. In that case the court holds that the purposes of these acts is to impose upon the local authorities the duty of designating streets for the erection of poles, etc., only in order that a through line may be constructed. Applying that construction to the present case, we think that the application is within it. The line was already in existence as a through line, but was built in the borough of Bound Brook, in part upon private property by permission, which might at any time be withdrawn, and the through line be interrupted; and the application was for the designation of streets which would fill up this interval, and connect the parts of an already existing through route, built, so far as appears, under lawful authority. The designation applied for was a part

of a through line, and, although the route asked for extended only part way through the borough, yet it connected other parts of a through line, and we think was within the legislation above referred to.

It is urged that an act amendatory of the telegraph act of 1875, approved March 19, 1900 (P. L. p. 74), affects the legislation above referred to so as by the eighth section to give a discretion to the municipal authorities to consent to or refuse the erection of poles by a telephone company; but it is only necessary to say that whatever power is given to the municipal authorities by this section they already had by the act of 1875, for it is simply a re-enactment in that respect of section 8 of the law of 1875, which was in force when the acts of 1880, 1887, and 1888, *supra*, were passed. The present case is not affected by the act of 1900. The New York & New Jersey Telephone Company appears to be a company duly incorporated, under the act of 1875, to incorporate and regulate telegraph companies. It was originally incorporated under that act as the New Jersey Telephone Company, and subsequently changed its name to the New York & New Jersey Telephone Company, as it might do under the general corporation act. The writ of mandamus will be allowed.

NOTE.—See note 2 at end of Part I.

THE CITY OF UTICA, Respondent, v. UTICA TELEPHONE COMPANY, Appellant.

New York Supreme Court, Appellate Division, Fourth Department, December, 1897.

(24 App. Div. 361.)

MUNICIPAL CONTROL OF TELEPHONE FIXTURES IN HIGHWAY.

The right given by the transportation corporations law (Laws 1890, chap. 566, sec. 102), to any telegraph or telephone company "to erect, construct,

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and maintain the necessary fixtures for its lines upon, over or under any of the public roads, streets and highways" is subordinate to the power to control the streets and remove and prevent encroachment, imposed by its charter upon the municipal authorities of the city of Utica, as a police power.

A permission given a telephone company to stretch wires across streets and along house-tops, with the owner's consent, confers no authority to put structures in the streets to support such wires.

Cases of this series cited in prevailing opinion: *People v. Metropolitan Teleph. Co.*, vol. 1, p. 604; *American Rapid Transit Co. v. Hess*, vol. 3, p. 142; *Eels v. American Tel. & Teleph. Co.*, vol. 5, p. 92; *Hudson River Teleph. Co. v. Watervliet T. & R. Co.*, vol. 3, p. 387, vol. 4, p. 275; *Monongahela City v. Monongahela Eleo. Lt. Co.*, vol. 4, p. 53.

Appeal from order of Supreme Court, Onondaga Special Term, denying motion to vacate temporary injunction restraining defendant from erecting poles and establishing a telephone line in the city of Utica.

Action for permanent injunction. Complaint alleges erection and maintenance of poles and wires in streets, obstructing their free and public use, without permission of the municipal authorities. Defendant was incorporated under the transportation corporations law (L. 1890, ch. 556, art. 8). It had succeeded by purchase to the rights of a previous corporation, which had permission from the city to "string wires across the streets of the city, also from house tops at such points as may be necessary, and at which owners of property may give their consent. Such wires to be so erected as not to interfere with the full and free use of the streets, and to be erected subject to the approval of the city surveyor." Said former company had not only strung wires, but had erected poles in the streets. When defendant succeeded to its rights, it sought from the common council confirmation therein and the right to furnish telephone communication in the city. The request was refused, but the defendant was proceeding to remove the decayed poles, substitute new ones, and otherwise to establish and operate its line, when interrupted by the injunction. The streets were already more or less occupied by the structures of other telephone, telegraph and electrical companies.

A. M. Mills, for the appellant.

John Brandegee, for the respondent.

WARD, J.: The defendant claims the right to construct and operate its telephone line without the consent of the city, under section 102 of chapter 566 of the Laws of 1890, being the Transportation Corporations Law, which provides:

"Such corporation (telegraph and telephone) may erect, construct and maintain the necessary fixtures for its lines upon, over or under any of the public roads, streets and highways; and through, across or under any of the waters within the limits of this State, and upon, through or over any other land, subject to the right of the owner thereof to full compensation for the same."

It also claims that, having acquired the right of the "Baxter Overland Telephone and Telegraph Co.," it can, under the franchise of that company, construct and operate its telephone lines.

The last claim will be disposed of first. The right of that company, as the foregoing statement shows, was limited to stretching wires across the streets and along the housetops where the owners consented. It conferred no authority to put structures in the streets or do any of the acts complained of by the city in this section, and is, therefore, no protection to the defendant in doing any act beyond the limited permission given to the old company by the common council.

The serious question is whether, under the statute cited, the legislature intended to permit any telephone or telegraph corporation that might be organized under the Transportation Corporations Act to occupy the streets of the city of Utica, and leave the city powerless to prevent it. If this is so, any company may invade the streets to the absolute interference with the business, travel and comfort of its citizens.

The learned counsel for the defendant cites several cases which have been decided by the courts of this State that he claims sustain his contention. They are *People v. Metropolitan Telephone, etc., Co.*, 1 Am. Electl. Cas. 604, 11 Abb. N. C. 304,

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S. C., 31 Hun, 596; *American Rapid Transit Co. v. Hess*, 3 Am. Electl. Cas. 142, 125 N. Y. 641; *Eels v. A. T. & T. Co.*, 5 Am. Electl. Cas. 92, 143 N. Y. 133; *Hudson River Telephone Co. v. W. T. & R. Co.*, 3 Am. Electl. Cas. 387, 4 Am. Electl. Cas. 275, 135 N. Y. 396; 121 id. 397.

An examination of these cases fails to show any judicial sanction for the particular contention here. Indeed, there is much in those cases which tends to overthrow that contention. We will not review them in detail, but refer to them to some extent hereafter.

We have not been referred to any case where this claim has been asserted of the right contended for under the statute cited. The question is, therefore, new, and must be decided upon a consideration, not only of this statute, but of the powers and duties of the plaintiff as a municipal corporation with reference to the streets of the city, as created by the charter and the ordinances of the city, and by the principles governing the rights of the public in the streets and highways as well as corporations exercising special privileges in the streets.

By the charter of the city of Utica the common council was given the power to perform the duties and be subject to the liabilities of commissioners of highways in towns, with the exceptions and modifications contained in the charter itself. It should also have the power to "lay out, open, make, amend, repair, alter, extend, widen, contract and discontinue streets, lanes and highways, walks, bridges, drains and sewers in the city," and to require the removal of any building, fence or other obstruction upon the line of any street.

Section 35 of the charter provided that the common council "shall have the care, management and control of the property of the city and its finances; it shall have power to ordain, alter, modify and repeal ordinances not repugnant to the constitution and laws of the State, such as it shall deem expedient for the good government of the city, the preservation of peace and good order, the suppression of vice and immorality, the benefit of

trade and commerce and the health of the inhabitants thereof, and such other ordinances, rules and regulations as may be necessary to carry such power into effect. It is also particularly authorized to enact ordinances for the following purposes," among which are the following: "To determine what are nuisances, and to prevent, abate and remove them; * * * to ascertain, establish and settle the boundaries of the city and all streets, alleys, and highways therein, and to remove and prevent *all encroachments thereon*."

By an amendment to the Utica charter in May, 1894, chapter 437 of the laws of that year, the legislature provided (sec. 99): "The common council shall have power to cause any street, highway, lane or alley in said city to be graded, leveled, paved, or repaved, macadamized or telforized, and to cause such crosswalks, sidewalks, drains and sewers to be made therein as it shall deem necessary, and the same to be repaired, mended or relaid as it shall deem necessary."

This amendment, it will be observed, was enacted several years after the revision of the Transportation Corporations Law in 1890, whereby the legislature again affirmed the right of the city to control its streets.

In pursuance of the power given the city under section 35 of the charter above quoted, the city adopted ordinances which were in force when the injunction in this action was granted forbidding the placing in any street of any obstruction thereof without permission of the mayor, etc.

Forbidding the placing in any street of any wood, lumber or other material or property of value.

Forbidding any person to take up any pavement in any street or side or crosswalk, or dig any hole or ditch in any street without permission of the mayor, etc.

Providing that no person should place in any street any ashes or any other obstruction to the use of the same by wagons, sleighs, etc.

Providing that the sidewalks and crosswalks of the city, be-

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ing intended for the public accommodation and convenience, should be kept and reserved free from all obstruction.

Providing that all telegraph and telephone wires should be placed beneath the fire alarm telegraph of the city. There is no dispute but that this last ordinance was violated by the defendant. Penalties were attached to the violation of these ordinances.

These provisions of the charter and of the ordinances are ample for the protection of the streets and the public that use them. The legislature had authorized them, and had constituted the city the agency to enforce them. They are necessary powers, and without them the city streets would be subject to all kinds of encroachments and their usefulness impaired if not destroyed.

The right to invade the streets with telephone lines secured by the Transportation Corporations Act must necessarily be subordinate to the right and duty of the city to keep its streets and sidewalks free and sufficient for the public use. Some power or jurisdiction must be the judge as to whether the proposed line will impair the usefulness of the streets. That power is given to the city where it must necessarily reside.

Take the case in hand; several corporations were already occupying the streets of Utica with their poles and appliances, when the defendant applied to the common council for leave to construct and operate its plant. The question for the common council to meet was, whether the defendant's structures would impair the usefulness of the streets already incumbered with similar lines.

In deciding that question they were acting in a *quasi* judicial or discretionary character, with which the courts will not ordinarily interfere. *Hines v. City of Lockport*, 50 N. Y. 236; *Mills v. The City of Brooklyn*, 32 id. 489; *Monongahela City v. Monongahela El. Light Co.*, 4 Am. Electl. Cas. 53.

The Transportation Corporations Act gave the defendant no interest in the streets of the city of Utica. It was only intended

to protect telegraph and telephone companies from indictment for maintaining public nuisances in putting their poles in the streets.

The legislature in the exercise of its police powers may regulate the use of the streets of a city and may prohibit their use for any purpose inconsistent with general street purposes. It may also authorize their use for public purposes not inconsistent with their use as streets. *Eels v. American Telephone & Telegraph Co.*, 20 N. Y. Supp. 600; *affd.*, 5 Am. Electrl. Cas. 92, 143 N. Y. 133; *Cohen v. The Mayor*, 113 *id.* 532, and see Judge ADAMS' opinion in *D. L. & W. R. R. Co. v. City of Buffalo*, 4 App. Div. 562, 564.

Section 102 of the Transportation Corporations Act, above cited, first appeared in the statutes of this State in chapter 265 of the laws of 1848. Section 5 of that act contained the provision we are considering. There was an amendment to that chapter in 1853. (Chap. 471.) Prior to the revision of 1890, section 5 read as does section 102 of the Transportation Corporations Law, except that it was provided that the lines should not be so constructed as to incommode the public use of the roads or highways. This last provision was omitted from the revision of 1890, and it is suggested by the learned counsel for the appellant that the omission of these words in the revision is significant of the intention of the legislature to permit the telephone lines to be constructed in the streets and highways whether they incommode the public use of the streets and roads or not.

We cannot suppose that the legislature intended such an extraordinary result by this omission; that contention is answered emphatically in the case of *H. R. T. Co. v. W. T. & R. Co.*, 3 Am. Electrl. Cas. 387, 4 Am. Electrl. Cas. 275, 135 N. Y. 393, 407, where the Court of Appeals says: "The primary and dominant purpose of a street is for public passage, and any appropriation of it by legislative sanction to other objects must be deemed to be in subordination to this use unless a contrary intent is clearly expressed."

There is no contrary intent expressed in the Transportation Corporations Law.

The counsel makes it an inference only from the omission, which is not supported by reason or authority.

The Utica city charter is a local law, and we are not to presume that the legislature intended by the General Telephone Act to repeal or nullify the provisions of the charter governing the admission of telephone and telegraph lines into the city in the absence of any legislative declaration to that effect. And the provisions of the Telephone Act are not so far inconsistent to the city charter as to create such a repeal by implication.

We cannot better conclude the discussion of this branch of the case than with a quotation from *Monongahela City v. Monongahela El. Light Co.*, *supra*: "All legislative grants to corporations . . . simply to occupy the streets . . . are made subject to the police powers of the municipality. . . . Where the legislature has given . . . a general grant to enter the streets of a city, still the city, in the exercise of its police powers, can supervise and control the erection and maintenance of its poles and wires. 'To say that a corporation or individual who has the right . . . to erect poles in the public highways, can do so without any restraint whatever, and without any liability to have the exercise of that right regulated with reference to the rights of other persons exercised upon the same highway, or to the rights of the municipality, appears to me to be the assertion of a proposition which would practically take the control of the streets out of the hands of the city and place them in the hands of individuals or corporations.'"

The appellant's counsel makes the point that the plaintiff is seeking to enforce the ordinances of the city by injunction, which cannot be done, and that the remedy is at law for the collection of the penalty. If the action was simply to enforce the ordinances and realize penalties, the objection would have force. But this action goes far beyond such narrow bounds. It is sought, in this action, to restrain acts that cannot be compen-

sated by damages. It is sought to prevent irreparable mischief; the mischief which it seeks to guard against, if consummated, would find no adequate remedy at law. The ordinances are simply referred to as indicating the power of the city in regard to its streets, and the exercise of that power to some extent in the creation of its ordinances. No penalties are sought to be recovered. This is purely an equitable action, and the right to maintain it upon the record presented to us upon this appeal would seem to be clear.

The order appealed from should be affirmed, with ten dollars costs and disbursements.

All concurred, except HARDIN, P. J., and ADAMS, J., dissenting, each of whom wrote an opinion.

NOTE.—See note 2 at end of Part I.

JOHN A. BARHITE, APPELLANT, v. THE HOME TELEPHONE
COMPANY OF ROCHESTER, N. Y., AND OTHERS, RESPON-
DENTS.

*New York Supreme Court, Appellate Division, Fourth Department, March,
1900.*

(50 App. Div. 25.)

TELEPHONE FRANCHISE.—MUNICIPAL CONTROL.

The simple fact that one man or set of men of doubtful or unknown financial credit offers to bid more than a competing company for a contract, e. g., a franchise to a telephone company, that is to be of permanent benefit or detriment to the citizens, does not require the municipal authorities to accept that offer, nor must they, in absence of charter provisions, necessarily make public sale at auction of the franchises.

The right of telegraph and telephone companies to use streets and highways for the construction and maintenance of their lines, conferred by

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section 102 of the transportation corporations law, does not require the consent of municipal authorities. It is a franchise from the legislature directly to the company. All that the municipal authorities have is the control, by virtue of their police power, of the manner of exercise by the company of its legislative grant, the location of its poles, stringing of its wires, etc.

Appeal from interlocutory judgment of Supreme Court, Monroe County, sustaining demurrer.

John A. Barhite, for the appellant.

George F. Yeoman, for the respondent, The Home Telephone Company.

Porter M. French, Corporation Counsel, for the other respondents.

SPRING, J.: The plaintiff is a taxpayer of the city of Rochester, and commenced this action April 21, 1899, pursuant to chapter 301 of the Laws of 1892, amending chapter 531 of the Laws of 1881, and section 1925 of the Code of Civil Procedure, to obtain a judicial determination that the contract set forth in the complaint and a resolution of the common council authorizing the same were illegal, and to enjoin the defendants from carrying out the same. The complaint, which is very voluminous, sets forth that the common council of the city of Rochester, on the 11th day of April, 1899, adopted a resolution granting to the defendant telephone company a franchise for its system in said city, and empowering and directing the mayor to execute a contract which had been prepared therefor, and a copy of which is contained in the complaint; that in compliance with such authority and direction said contract was duly executed and delivered by said mayor and said telephone company, and that said telephone company has already begun to carry out the same; that while said subject was pending before said common council, one Fred Gleason presented to said body his petition in which he purported to represent others, mainly citizens of Rochester,

who were associated together in the enterprise outlined therein and offered for the said franchise which it was then intended to grant to the said Home Telephone Company the sum of \$15,000, and to accept and perform the said contract. Said petition further contained an offer to bid for said franchise in the event that said common council determined that more than said sum could be obtained for such franchise; and further agreeing to support its offer by "bond, cheque or deposit of money" for the faithful performance of any agreement entered into by said petitioner and his associates. The complaint avers that Gleason personally and by attorney supplemented his petition by appearance before the committee having the special charge of the consideration of the granting of the said franchise and solicited the granting of the same to him and his associates, and that said franchise should be sold to the highest bidder therefor. The complaint further charges that said common council and the said special committee "wrongfully, unlawfully, fraudulently and collusively, and in violation of their duties as officials of the city of Rochester, . . . ignored the said petition . . . and refused to grant a franchise to said Gleason, and refused to grant said franchise to the person, persons or corporation who would pay the largest sum therefor to said city, and wasted the property and funds of said city for the purpose of favoring the defendant, The Home Telephone Company, of Rochester, N. Y.;" that while said lamp committee had said matter under consideration it "wrongfully and unlawfully" permitted the mayor of said city and others to be present at its sessions, and to urge the execution of said contract with said defendant telephone company, and allowed said mayor to vote as a member of said committee upon the question of granting said franchise, although not a member of said committee; that the construction and operation of said telephone system will be attended with danger to the citizens and their property for reasons set forth in said complaint. It is further alleged that the recommendation of said lamp committee was "illegally, fraudulently

and collusively adopted by said common council, and without a knowledge of the contents of said contract on the part of many of the members of said council who voted in favor thereof, and that said resolution and said contract were and are illegal, fraudulent and void, and that the construction, maintenance and operation of a telephone system under and in pursuance of said contract would waste and injure the property and funds of the city of Rochester;" that said resolution was adopted hurriedly and without the two weeks' notice of such action provided for in the rules of said common council, unless the same is by the unanimous consent of said board, which was not given on the passage of the resolution; that the resolution and contract were illegal and void and contrary to law, and against public policy.

This, in condensed form, is the complaint, and it is apparent it is meager of facts on which to hinge the charge of fraud. The common council of the city is its legislative body, and within its sphere of action its legislative cognizance is supreme and cannot be fettered or obstructed by judicial interference. *Kittinger v. Buffalo Traction Co.*, 160 N. Y. 377; *People ex rel. Sturgis v. Fallon*, 152 id. 1, 11.

Judge Cooley, in his work on Constitutional Limitations (6th ed.), in discussing the independence of a legislative body from interference by the courts, says at page 229: "Restraints on the legislative power of control must be found in the constitution of the State, or they must rest alone in the legislative discretion. If the legislative action in these cases operates injuriously to the municipalities or to individuals, the remedy is not with the courts. The courts have no power to interfere, and the people must be looked to, to right through the ballot-box all these wrongs."

The charter of the city is the offspring of the legislature. It vests the municipal body with legislative authority, because that delegation is deemed wise and practical on the assumption that the citizens of the municipality and its officers can better legislate for its inhabitants than the State legislature. It is in

furtherance of home rule, and is a normal product of the principle of self-government. The transmission of this power vests in the local legislative body, within its restricted range, the same plenary force as if retained and executed by the legislature itself, but it must be borne in mind that the power vests only by explicit warrant. As was said in *People ex rel. Wakeley v. McIntyre* (154 N. Y. 628), in construing a cognate delegation of authority: "Within the limits of this delegated power the board of supervisors is clothed with the sovereignty of the State, and is authorized to legislate as to all details precisely as the legislature might have done in the premises." *People ex rel. O'Connor v. Supervisors*, 153 N. Y. 370; *City of Buffalo v. N. Y., L. E. & W. B. R. Co.*, 152 id. 276.

There is a class of cases where the authority exercised by the common council, though delegated by the legislature, is purely administrative in its character, where a different rule prevails. See *Weston v. City of Syracuse*, 158 N. Y. 274.

If courts, even in a case of palpable fraud, possess the power to interfere and restrict a body executing its legislative authority within its prescribed compass, that power will be exercised only in an extraordinary case, and when public policy imperatively requires it. If the courts, on every general charge of fraudulent, collusive conduct against the members of a municipal body with delegated legislative power, should intervene to restrain the execution of its normal duties thus delegated, the clashing between the two co-ordinate branches would be fraught with immeasurable harm. The policy of our constitution is to keep these two branches distinct, each to be supreme in its own domain, and transgression upon the province of the one would invite a like trespass upon the other until the barriers separating the two would be wholly removed.

In the present case the only fact upon which the charge of fraud hinges is, that the common council declined to accept the proposition of Mr. Gleason, involving, as it is claimed, loss to the city of \$15,000. The petition presented did not apprise

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that body what the occupation, residence or responsibility of the petitioner was. It was significantly silent as to the names of his associates and their ability to undertake and perform this contract of so great importance to the city of Rochester. The defendant telephone company was a body corporate, and that it possessed the financial strength to execute successfully the obligation to be imposed by the contract was probably known to the members of the common council. That body was intrusted with an important duty and in its performance had a wide discretion. The simple fact that one man or set of men of doubtful or unknown financial credit offered to bid more than a competing company for a contract that was to be of permanent benefit or detriment to the citizens of the city, did not require the common council to accept that offer if its judgment favored another company. The larger sum bid in this case was not the all-controlling, determining factor. Other circumstances entered into the question, and the body intrusted with the granting of this franchise, in the fulfillment of its obligations to its constituency, was bound to weigh all the various considerations and then to decide what was for the best interests of the city, and when that decision was reached and made effectual by the agreement, its action could not be disturbed. There is nothing in the city charter making a sale at public auction obligatory upon the common council. The manner of the sale is wholly in the discretion of that body whenever it possesses the right to sell. To be sure, the complaint imputes fraud and collusion to this body, but an analysis of the facts upon which the sweeping condemnation is based fails to support it. As was said by Chief Judge PARKER, in *Kittinger v. Buffalo Traction Co.* (160 N. Y., *supra*, at p. 387), in regard to a similar averment: "Impressive as this allegation is when first read, it will be found on analysis not to allege a single fact which would legally support a conclusion that any member of the common council was bribed, or that he voted in favor of the consent through promise of gain to himself or others."

The bare allegation that the conduct of the common council was fraudulent, or that the contract was illegal, does not state an issuable fact. *Talcott v. City of Buffalo*, 125 N. Y. 280.

It is a conclusion entirely proper to be stated in summing up an array of facts which support the general charge; but, independent of any fact to uphold it, it is of no weight.

It is contended that the allegation that the request of Mr. Gleason was ignored "for the purpose of favoring the defendant, The Home Telephone Company of Rochester, N. Y.," is an averment of a distinct fact upon which the charge of fraud or collusion can be hinged. It is a bald statement without any coincident fact to justify it, and the "favor" may have been from the worthiest of motives. It is inadequate in any event to warrant a judicial investigation into the reasons actuating a municipal body in granting a franchise on the charge it was inspired by corrupt motives—a field the courts are chary in entering. The averment that the mayor attended the meeting of the lamp committee and voted thereat is of no consequence as the power was vested with and exercised by the common council. Even if the interference of the mayor were unauthorized there is no suggestion he continued to exert his influence over the council itself, and no fact is alleged in the complaint from which we can spell out any improper, corrupt intermeddling with the granting of this franchise to the defendant telephone company.

But beyond this we are decidedly of the opinion that the city of Rochester had no franchise to sell. As has been suggested, the tendency of modern legislation is to transmit to the local authorities the exclusive dominion over the streets of the respective municipalities, but the transmission of that authority must be evidenced by specific warrant, for the power is in the State primarily. (*Skaneateles W. W. Co. v. Village of Skaneateles*, 161 N. Y. 154, 165; *Ghee v. Northern Union Gas Co.*, 158 id. 510; *Adamson v. Nassau Electric R. R. Co.*, 89 Hun, 261.)

In every instance, so far as I have been able to discover, where the consent of a municipal body has been held to be a

necessary preliminary to the occupation of its streets by a corporation, that consent has been based upon the delegation of power by the legislature. In the Transportation Corporations Law (chap. 566, Laws of 1890), pipe line corporations (secs. 45, 46), gas and electric light corporations (sec. 61, subd. 1), waterworks corporations (sec. 80), and others enumerated in this act, are required to procure the consent or permit of the street-governing body before any right to the use of the street exists in the corporation.

By the same act (sec. 102), the right of telegraph and telephone corporations to use the public streets and highways for the construction and maintenance of its lines is given in unmistakable language and the consent of the local body is not required. This franchise, therefore, comes directly from the legislature to the corporation.

By amendment to the charter of the city of Rochester, enacted in 1894 (chap. 28, sec. 8, amdg. subd. 7 of sec. 40 of said charter), authority is given to the common council "to regulate and control the erection, construction, laying, stringing, maintaining and removing of all wires, cables, poles, conduits and subways upon, over and under the streets, avenues, lanes, squares, parks, bridges, aqueducts and public places within said city."

This provision does not relate to the right to the use of the streets. It is no infringement upon the power vested in the State legislature to grant the franchise to telephone corporations. When a corporation of this kind is to avail itself of the legislative grant, the manner of its exercise, the location of its poles, the stringing of its wires, etc., are within the control and regulation of the local legislative body. That is one of the police functions committed to the municipality. This right of regulation is, however, entirely distinct from the original granting of the privilege. It is subordinate to that right. The local body has no authority to intervene until the corporation is seeking to exercise the privilege accorded it by the State, and then not to enjoin such exercise if within the letter of its authority, or to

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exact compensation for the franchise, but to protect the citizens and the public. It may intercede to reduce to a minimum this interference with the public user, to require that the privilege shall be exercised most beneficially to all people interested, or for any other purpose involving "control and regulation" by the local authorities. But this intervention recognizes the franchise as existing in the corporation.

The interlocutory judgment sustaining demurrers should be affirmed, with costs of this appeal to each respondent and with leave to amend.

All concurred; LAUGHLIN, J., concurring in result only.

Interlocutory judgment affirmed, with costs of this appeal to each respondent.

NOTE.—See note 2 at end of Part I.

SOUTHERN BELL TELEPHONE COMPANY V. CITY OF RICHMOND.

United States Circuit Court of Appeals, Fourth Circuit, July 9, 1900.

TELEPHONE APPLIANCES IN STREETS.—MUNICIPAL CONTROL.

A Virginia statute (Code 1887, secs. 1287-1290), which authorizes telegraph and telephone companies to construct and maintain their lines "along or over the streets of any city or town with the assent of the council thereof," but does not define the conditions of such occupation and requires the municipal consent to both construction and maintenance.

Held, to delegate to the city councils power to attach conditions to their consent, especially as to a city whose charter gives its council general authority over the streets and forbids their occupation without its consent.

Held, also, that in an ordinance granting to a telephone company the privilege of using certain streets, a provision reserving the right of repeal was valid and binding on the company accepting the grant, even although the council had authority to grant only a privilege without condition.

Appeal from the Circuit Court of the United States for the Eastern District of Virginia.

This case comes up on appeal from a decree of the Circuit Court of the United States for the Eastern District of Virginia. 98 Fed. 671. The bill was filed by the Southern Bell Telephone & Telegraph Company, for the purpose of securing an injunction against the city of Richmond, in these words: "That said city, and all others, its agents and employees, may be restrained and enjoined from removing or interfering with its poles and wires in said city, and from interfering with the right of your orator to use said poles and wires, and that all proceedings by said city or its agents, and all others, to prevent your orator from continuing, renewing, repairing, and extending its lines, wires, and poles in, along, and over the streets and alleys of the said city; and to inflict fines and penalties on your orator for so doing, may be restrained and enjoined; that the right of your orator to use said poles and wires, and to carry on its business along and over the streets of the said city, be declared and defined; that the ordinance of the said city of the 14th of December, 1894, and of the 10th of September, 1895, so far as they undertake to prevent your orator from maintaining and using its lines, poles, and wires over and along the streets and alleys of the city of Richmond, from repairing, renewing and extending its said poles, wires, lines, and routes as its business may require, may be declared null and void; that your orator may have such other, further, general, and complete relief as may be agreeable to equity and the nature of its case." The bill claimed that the complainant had entered upon and had secured the use of the streets and alleys of the city of Richmond for its poles and wires, under the authority of the act of Congress July 24, 1866 (14 Stat. 221, c. 230), and that under this act it was and is entitled to maintain and operate its lines through and over the streets and alleys of the city of Richmond, without regard to the consent of the said city. The act of 1866 applies to telegraph companies, and the complainant claimed the privileges there-

under because a telephone company was embraced and included in the term "telegraph company." This contention was sustained by the Circuit Court, which, without passing upon the rights claimed by the complainant company under the laws of Virginia and the ordinances of the city of Richmond, adjudged that the complainant company had, in accordance with the terms and provisions, and under the protection of the act of Congress of the United States approved July 24, 1866, which is an authority paramount and superior to any State or city ordinance in conflict therewith, the right to construct, maintain, and operate its line over and along the streets and alleys of the city of Richmond. Upon this ground the injunction prayed for was granted. The case then came up by appeal, with assignments of error, into this court, whereupon this court, concurring with the Circuit Court in the opinion that the complainant company was entitled to the privileges and was under the protection of the act of Congress of 1866, after modifying the decree in certain particulars, not necessary to be mentioned now, confirmed its conclusion and sustained the injunction. The cause was removed by *certiorari* into the Supreme Court of the United States. That court reversed the conclusion reached by this court, declaring that the complainant company, being a telephone company, did not come within the provisions of the act of 1866, which granted privileges and protection to telegraph companies, because telephone companies were in no sense telegraph companies. The opinion filed by the Supreme Court ends thus: "What rights the appellee (the Southern Bell Telephone Company) had or has under the laws of Virginia and the ordinances of the city of Richmond is a question which the Circuit Court did not decide, but expressly waived. It is appropriate that that question should be first considered and determined by the court of original jurisdiction." 174 U. S. 778, 19 Sup. Ct. 784, 43 L. Ed. 1169. The decretal order is as follows: "The cause is remanded, with directions for such further proceedings in the Circuit Court as may be in conformity with this opinion and consistent

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with law." *Id.* The opinion of this court, while adjudging that complainant company had all the privileges and protection granted by the act of 1866, had also adjudged that such rights and privileges were to be enjoyed in subordination to public use and private rights, and subject to any lawful exercise of the police power belonging to the State or one of its municipalities. This was approved and affirmed by the Supreme Court in its opinion. The cause, having been remanded, was heard in the Circuit Court. That court held that, under the laws of Virginia and the ordinances of the city of Richmond, the Southern Bell Telephone & Telegraph Company has no right to use the streets of that city. For this reason it denied the relief asked, dissolved the injunction theretofore granted, and dismissed the bill. Leave to appeal was granted upon assignments of error. and the cause is here upon these.

A. L. Holladay and Hill Carter (George H. Fearons, on the brief), for appellant.

Henry R. Pollard, City Atty., for appellee.

Before SIMONTON, Circuit Judge, and BRAWLEY, and PURNELL, District Judges.

SIMONTON, Circuit Judge (after stating the facts as above): The question before this court is that sent down by the Supreme Court to the Circuit Court: what rights have or had the Southern Bell Telephone & Telegraph Company, under the laws of Virginia and the ordinances of the city of Richmond, to construct, maintain, and operate its lines in the streets and alleys of that city? The statute law of the State of Virginia in relation to telegraph and telephone companies is found in chapter 54 of the Code of 1887 (secs. 1287, 1288, 1289, 1290). Section 1287 is as follows:

"Right of Telegraph and Telephone Companies to Construct and Operate Lines.—Every telegraph and every telephone company incorporated by this

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or any other State, or by the United States, may construct, maintain and operate its line along any of the State or county roads or works and over the waters of the State, and along and parallel to any of the railroads of the State, provided the ordinary use of such roads, works, railroads and waters be not thereby obstructed; and along or over the streets of any city or town with the consent of the council thereof."

It may be noted in passing that when the legislature is granting the use of any of the State or county roads or works, and over the waters of the State, and along or parallel to its railroads, it states the conditions in full. When the legislature comes to the use of streets of a city or town, it refers these conditions to the council of such city or town. Section 1288 provides for contracts for rights of way. Section 1289 provides, when compensation cannot be agreed on, how ascertained; what title the company acquires. Section 1290 provides as follows:

"Right of Repeal by General Assembly.—The three preceding sections shall be subject to repeal, alteration or modification, and the rights and privileges acquired thereunder shall be subject to revocation or modification by the general assembly, at its pleasure."

Sections 1291, 1292, 1293, and 1294, relate to the transaction of the business of telegraph and telephone companies after their lines are up.

Section 7 of the charter of the city of Richmond is as follows:

"To close or extend, widen or narrow, lay out and graduate, pave and otherwise improve streets and public alleys, in the city, and have them properly lighted and kept in good order; and they shall have over any street or alley in the city, which has been or may be ceded to the city, like authority as over other streets or alleys. They may build bridges in, and culverts under, said streets; and may prevent or remove any structure, obstruction or encroachment over or under, or in a street or alley, or any sidewalk thereof, and may have shade trees planted along the said streets; and no company shall occupy with its works the streets of the city without the consent of the council." Laws 1869-70, p. 124.

The Southern Bell Telephone & Telegraph Company is a corporation of the State of New York. On the 26th of June, 1884, the city council of Richmond passed the following ordinance:

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"Granting the right of way throughout the city to the Southern Bell Telephone & Telegraph Company.

"Section 1. Permission is hereby granted the Southern Bell Telephone & Telegraph Company to erect poles and run suitable wires thereon for the purpose of telephonic communication throughout the city of Richmond, on the public streets thereof, on such routes as may be specified and agreed on by a resolution or resolutions of the committee on streets, from time to time, and upon the conditions and under the provisions of this ordinance.

"Sec. 2. On any route conceded by the committee on streets, and accepted by the company, the said company shall, under the direction of the city engineer, so place its poles and wires as to allow for the use of the said poles by the fire alarm and police telegraph, in all cases giving the choice of position to the city's wires, wherever it shall be deemed advisable by the council or the proper committee to extend the fire alarm and police telegraph over such route.

"Sec. 3. The telephone company to furnish telephone exchange service to the city at a special reduction of ten dollars per annum for each municipal station.

"Sec. 4. No shade trees shall be disturbed, cut or damaged by the said company in the prosecution of the work hereby authorized without the permission of the city engineer and consent of the owners of property in front of which such trees may stand, first had and obtained; and all work authorized by this ordinance shall be, in every respect, subject to the city engineer's supervision and control.

"Sec. 5. This ordinance may at any time be repealed by the council of the city of Richmond; such repeal to take effect twelve months after the ordinance or resolution repealing it becomes a law."

And on the 14th of December, 1894, that ordinance was repealed, as follows:

"Repealing an ordinance approved June 26, 1884, concerning the Southern Bell Telephone and Telegraph Company.

"Be it ordained by the council of the city of Richmond, that the ordinance approved June 26, 1884, granting the right of way throughout the city to the Southern Bell Telephone and Telegraph Company be, and the same is hereby, repealed; that, in accordance with the fifth section of said ordinance, all privileges and rights granted by said ordinance shall cease and be determined at the expiration of twelve months from the approval of this ordinance by the mayor."

The appellants contend: That all their rights are derived from the legislative enactment. That they have no right to use the roads, etc., of the State, and the streets of the cities and

towns, except by reason, primarily, of that enactment. That the consent of the council of the municipality must be had before the right to use the streets which is granted by the act of assembly can be exercised. But, such consent having been obtained, the right to use the streets is referred to the act of assembly, and not to the ordinance. So that the legislature reserved to itself the right to repeal, alter, and modify section 1287 and succeeding sections, and to revoke and modify the rights and privileges acquired thereunder. The rights and privileges of the complainant company, including that of constructing, maintaining, and operating their lines on the streets of Richmond, having been acquired under the act of assembly, cannot be revoked or modified except by the action of the general assembly; this right having been expressly reserved by it. This being so, the attempt of the city council, in the ordinance of 1884, to reserve to itself the right to repeal that ordinance and withdraw the privileges granted thereunder, is *ultra vires* and void.

The learning of the counsel for the appellant has brought to the attention of the court four decisions in cases of this character in courts of last resort in Pennsylvania, Connecticut, New Jersey, and Maryland. In *Appeal of City of Pittsburg*, 115 Pa. St. 4, 7 Atl. 778, an act of assembly gave the right to a corporation to enter upon any public lane, street, alley, or highway for the purpose of laying down pipes, altering, inspecting, and repairing the same, in such way as to do as little damage as possible to the highway, and to impair as little as possible the free use thereof, and subject to such regulations as the councils of cities should by ordinance adopt. Another section of the act provided that new companies should not enter upon or lay down pipes in any streets, etc., of any borough or city, without the assent of the councils thereof, duly passed and approved. It was held that, inasmuch as the act of assembly gave detailed instructions as to the use of these pipes, the only thing the councils could do was to assent or dissent to the entry of a company on its streets, and that it must give such assent without condi-

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tions onerous in themselves and tending to defeat the benevolent purposes of the act, and that, having once assented, they could not revoke the consent.

In *State v. Mayor, etc., of City of Jersey City* (N. J. Sup.), 8 Atl. 123, the act of the legislature of New Jersey provided:

"That any telegraph company organized by virtue of this act [a general act] shall have full power to use the public roads and highways in the State on the line of their route for the purposes of erecting posts or poles on the same to suspend wires and other fixtures, upon first obtaining the consent in writing of the owner of the soil; provided, however, no posts or poles shall be erected on any street of an incorporated city or town without first obtaining from the incorporated city or town a designation of the streets in which the same shall be placed and the manner of placing the same."

In accordance with this act, Jersey City, on the application of the Hudson Telephone Company, designated certain streets in that city in which its poles could be placed, and the manner of placing the same. The company complied with the designation, and proceeded to place, and had placed, many poles in the streets designated. The city council then repealed the ordinance granting the permission. The court held that this repeal was ineffective; the company, under the act, having obtained a vested right, of which it could not be stripped by the ordinance.

In *Mayor, etc., of Baltimore v. Radecke*, 49 Md. 217, these were the facts: In 1866 Radecke applied to the city council for permission to erect and use on his premises a steam engine for the purpose of his business. This application was granted by the passage of a resolution containing a provision, in accordance with a city ordinance on the subject, that the engine was to be removed after six months' notice to that effect from the mayor. Radecke erected his engine and used it until some time in 1873. He then received a notice to remove it. He refused to do so, and suit was entered for the fine in such case provided. The court held that ample power had been given to the city council to legislate upon the subject of the erection and use of steam engines in the city; that, as to the necessity for municipal

legislation on this subject, the mayor and city council are the exclusive judges, while the means and manner of enforcing such legislation are committed to their sound discretion; that this discretion, though broad, is not absolutely and in all cases beyond judicial control, for there may be a case in which an ordinance passed under a grant of power like this is so clearly unreasonable, so arbitrary, oppressive, or partial, as to raise the presumption that the legislature never intended to confer the power to pass it, and to justify the courts in interposing and setting it aside as a plain abuse of authority; that the ordinance in question, requiring the removal of steam engines after notice from the mayor, did not prescribe regulations for their construction, location, or use, but committed to the unrestrained will of a single public officer a power over the use of steam within the limits of Baltimore practically absolute, so that he may prohibit it altogether; that this power may be exercised from enmity or prejudice, from partisan zeal or animosity, from favoritism, and other improper motives, easy of concealment and difficult of detection, hardly falls within the domain of law, and is void.

Southport v. Ogden, 23 Conn. 128, held that, when an act of assembly forbade the taking of oysters during certain months of the year in any waters of the State, a municipal ordinance forbidding the taking of oysters within the bounds of the municipality for certain months within the prescribed period, but for fewer months, is null and void, as in conflict with the act of assembly, and as making a party liable for two prosecutions for the same act.

It will be observed that in the Pittsburg case, the legislature dealt directly with the company, and prescribed its duties. But a single act was required from the municipal corporations. That was to consent or refuse. By consenting they admitted the company into their streets, and thenceforward they were under the provisions set out at large in the act of assembly. In the New Jersey case, also, but a single act was required of the city council,—the selection and designation of the streets in which under

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the act of the legislature, the company set up its poles, strung its wires, and conducted its business. This the city council did. Thenceforward the telephone company proceeded under the act of the legislature, and actually put up its poles. It was too late for the city council to recede. The Connecticut case has but a remote bearing on the case at bar. To say that there is a conflict between the State legislature and the city ordinance would be begging the question. The Maryland case will be commented upon hereafter.

It becomes necessary to inquire, what are the rights and privileges acquired by the Southern Bell Telephone & Telegraph Company under this act of the general assembly of Virginia? It has the right to construct, maintain and operate its line along any of the State or county roads or works, and over the waters of the State, and along and parallel to any of the railroads of the State, upon one condition only; and that is that the ordinary use of such roads, works, railroads, and waters be not obstructed. Thus the exercise of the police power is expressly reserved. And it has the right to construct, maintain, and operate its line along or over the streets of any city or town upon one condition only,— that this right be exercised with the consent of the council thereof. So the entire exercise of the police power is delegated to the municipality. The consent of the council is an indispensable condition, as well to the construction as to the maintenance and the operation of the line. These words, "maintain and operate," include a series of continuous acts,—the constant and daily use, the keeping up of the efficiency, of the line. To all these the consent of the council is necessary, and must always be given. Had the act of assembly simply required the consent of the council to the construction of the line, perhaps, the consent once having been given, the line could then have been maintained and operated under the act, subject only to the police power. But the condition requires the consent of the council, not only to the act of construction, but to the continuous and continuing acts of maintaining and operating the line. Nor is this

inconsistent with prior legislative action. The charter of Richmond, for instance, had placed its streets and alleys under the sole control, regulation, and disposition of the city council. The legislature could not, without repealing this clause of its charter, have disposed of the use of the streets and alleys without its consent. It is true that the legislature, under section 1290, could have repealed, altered, or modified all the provisions relating to telegraph and telephone companies, and could have revoked or modified the rights and privileges acquired by them, and, it may be, can authorize the use of the streets and alleys without the consent of the council, although this would be an enlargement of the privileges of these companies, and not a modification. This word, properly, is to qualify or restrict. But to do this the general assembly must not only repeal, alter, or amend this act, but also the charter of the city. Nor can it be said that a telephone company owes its right to construct, maintain and operate its lines, within the limits of a municipality, solely to the action of the general assembly. The condition precedent to its use of the streets and alleys of the municipality is the consent of the council. Without this consent it can do nothing. And the most reasonable construction is that, so far as the use of the streets and alleys is concerned, the legislature has delegated to the council the sole right of bestowing the right and privilege upon the company. When the company use these streets and alleys, it does so, not because the general assembly authorized it, but because the council has consented to it. Without such consent, it can set up no authority under the act. The distinction between the cases quoted above and that before the court lies just here. In those cases but one thing was to be consented to by the municipality,—the laying of the pipes in the streets of Pittsburg; the designation of such streets for the erection of poles in Jersey City. When consent for this was given, the condition of the act of assembly was fulfilled. In the case before the court the city council must consent not only to the construction, but to the maintenance and to the operation of the

line,—a consent to the inception, the operation, the continuous existence of the line. The case of *Mayor, etc., of Baltimore v. Radecke*, 49 Md. 217, is very nearly on all fours with the case before the court. There the ordinance distinctly notified Radecke that he erected and kept up his steam engine subject to the right of the mayor to revoke the privilege. The court (a State court), construing an ordinance passed under the supposed authority of the legislature, declared the ordinance unreasonable and void. A State court may, perhaps, have the power to do this. We doubt very much if this lies within the province of a Federal court. The construction of the ordinance in question here involves no Federal question. Its validity is not attacked as repugnant to the construction or application of the constitution of the United States. It would be a grave stretch of authority in a Federal court to sit in judgment upon and criticise the motives of a body established purely for local government.

When the Southern Bell Telephone & Telegraph Company applied to the city council of Richmond for its consent to the construction, maintenance, and operation of its line in the streets and alleys of that city, the ordinance of 1884 was passed. This ordinance gave the consent desired, and expressed the terms on which such consent was granted. It is in five sections, and each section specifies the conditions on which the consent is given. These conditions were accepted by the telephone company in the most direct and satisfactory way. The company acted upon them, and under the ordinance constructed, maintained, and operated its line. No question is made as to the first four conditions. The fifth is in these words: "This ordinance may at any time be repealed by the council of the city of Richmond." Then are added words which are clearly a concession to the company: "Such repeal to take effect twelve months after the ordinance or resolution repealing it becomes a law." Under the act of the general assembly, the council could consent or refuse. It states to the company the terms on which it will give its consent. These terms were accepted by the company, and the ordinance discloses the contract between them. If the terms

were distasteful to the company, it could have refused them, or, at the least, protested against them. It is contended that under the act of the legislature the city council could give only a categorical answer to the request for its consent, "Yes" or "No," without terms or conditions. But as the act itself expressed no regulations to be observed by a telegraph or telephone company in its use of the streets or alleys of a municipality, although it had done this to the use of county and State roads, etc., clearly in referring such a company to a municipal council, it was intended that the council could state the proper measures for protecting the streets, alleys and the public. Especially is this so when the consent must be obtained, not only to construct, but to maintain and operate, the lines. Again, it is contended that under the provisions of the act of assembly the city council of Richmond had authority only to consent or refuse permission to the Southern Bell Telephone & Telegraph Company to construct, maintain, and operate its line in that city, and that such consent or refusal must have been given without any qualification or condition whatever. It must have been a categorical "Yes" or "No." But the city council did in fact express conditions and qualifications in giving its consent. It may safely be assumed that, without such qualifications and conditions, consent would not have been given; that they were the reasons and motive cause for the consent. Then, if the city council could not have given—had no authority to give—a conditional or qualified consent, its attempt to consent was unauthorized, *ultra vires*, and void, and in fact it never has consented in the only way in which complainants maintain it could consent. From this point of view, the condition precedent of the act of the general assembly has not been performed. In order to maintain and operate its line in Richmond, the telephone company is without the consent of the council, and must obtain it. We see no error in the judgment of the Circuit Court. Its decree is affirmed.

NOTE.—See note 2 at end of Part I.

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STATE EX REL. SPOKANE & BRITISH COLUMBIA TELEPHONE & TELEGRAPH COMPANY V. CITY OF SPOKANE ET AL.

Washington Supreme Court, February 18, 1901.

TELEPHONE APPLIANCES IN STREETS—MUNICIPAL CONTROL.

The refusal of municipal authorities, empowered by statute to authorize or prohibit the use of electricity in streets, to permit a certain company to erect wires in the streets does not render exclusive the right, previously given to another company, and so is not obnoxious to a constitutional provision prohibiting the grant of such exclusive privileges.

A constitutional provision that any corporation shall have the right to construct telephone lines within the State, and that all such companies are common carriers and shall have the right of eminent domain, and that the legislature shall provide reasonable regulations to give effect to the section, is not self-operative, and hence, in the absence of legislative regulation, does not confer on telephone companies the right to use the streets of a city.

Under a statute authorizing the construction of all necessary telephone lines for public service along and on any public street or highway, but which provides that, where the right of way is within the corporate limits of a city, the consent of the city council shall be obtained before the line can be erected,—

Held, that a city has power to refuse to allow a telephone company to use its streets and that its authority is not limited to a reasonable regulation of the method of using streets for such purposes; the power to refuse being correlative to the power to consent.

Cases of this series cited in opinion: *Cincinnati Incl. Pl. Ry. Co. v. Suburban Tel. Assn.*, vol. 3, p. 443; *Hudson River Teleph. Co. v. Waterliet T. & Inhabitants of Summit Tp. v. N. Y. & N. J. Teleph. Co.*, vol. 7, p. 58; *So. Bell Teleph. Co. v. Richmond*, vol. 7, p. 83.

Appeal from judgment of Superior Court, Spokane County, quashing a writ of mandamus to compel the respondents to consent to the use of the streets of the city of Spokane by relator for the erection of telephone lines.

Stoll & Macdonald, Henley, Kellam & Lindsley, and W. S. Dawson, for appellants.

Fred M. Dudley, for respondents.

REAVIS, C. J.: The appellant (plaintiff) is a corporation created under the laws of the State for the purpose of constructing and operating a telephone line and system within this State between the Canadian boundary on the north and the city of Spokane on the south. It made application to the city of Spokane for the city's consent to erect its telephone poles and construct its wires through the streets of the city. In its application it offered to submit to such reasonable rules and regulations as might be imposed by the city. Upon consideration of the application by the city council, such consent was refused. Appellant thereafter instituted proceedings in the nature of mandamus to compel the city to give its consent to the construction and operation of appellant's telephone system, and that the city be required to prescribe reasonable rules and regulations therefor. The affidavit upon which the application was based states that appellant was willing to abide by and conform to any reasonable rules and regulations imposed by the city; that it had built and was operating and maintaining a system of telephones between the town of Northport and the city of Spokane, a branch line from the town of Meyers Falls to the town of Republic, and another line from Bossburg to the boundary line between the United States and Canada, connecting with towns in the province of British Columbia; that it was under contractual relations with another company owning and operating telephones in the province of British Columbia by which it was required to deliver the messages of the foreign company within this State, and especially within the city of Spokane; that in 1896 it had entered into a contract with the Inland Telephone & Telegraph Exchange, in the city of Spokane, owning and operating lines of telephone in Idaho, Oregon, California, and elsewhere in this State; that under the terms of such contract the wires of appellant were connected with the central office of the Inland Telephone & Telegraph Company in the city of Spokane, and, as occasion required, were connected with the system of the Inland Telephone Company and the telephones of its numerous sub-

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scribers in the city of Spokane; that, by reason of such contract, appellant had procured a large and lucrative business, which produced an income of many thousand dollars per month, and was rapidly increasing; that in June, 1899, the Inland Telephone Company terminated its contract with appellant and severed its lines from its office, rendering impossible any communication from appellant's lines to those of the Inland Company, and making communication impossible between the customers and patrons of appellant and persons having telephones in offices or residences in the city of Spokane; and that, to enable appellant to properly transact its business and give proper service to the public as a common carrier, it became necessary for appellant to establish an exchange at the city of Spokane. An alternative writ of mandamus was issued from the Superior Court. The respondent city appeared and demurred to the writ, and moved that the same be quashed. The demurrer was sustained.

Pertinent to the issues involved in the controversy are the following provisions of the constitution of Washington:

"No law shall be passed granting to any citizen, class of citizens, or corporation, other than municipal privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations." Article 1, sec. 12. "Any association or corporation, or the lessees or managers thereof, organized for the purpose, or any individual, shall have the right to construct and maintain lines of telegraph and telephone within this State, and said companies shall receive and transmit each other's messages without delay or discrimination, and all of such companies are hereby declared to be common carriers and subject to legislative control. Railroad corporations organized or doing business in this State shall allow telegraph and telephone corporations and companies to construct and maintain telegraph lines on and along the rights-of-way of such railroads and railroad companies, and no railroad corporation organized or doing business in this State shall allow any telegraph corporation or company any facilities, privileges, or rates for transportation of men or material or for repairing their lines not allowed to all telegraph companies. The right of eminent domain is hereby extended to all telegraph and telephone companies. The legislature shall, by general law of uniform operation, provide reasonable regulations to give effect to this section." Article 12, sec. 19.

Paragraph 7, section 739, Ballinger's Ann. Codes & St., vests cities of the first class, of which respondent is one, with power

"to lay out, establish, open, alter, widen, extend, grade, pave, plank, establish grades, or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks, and other public grounds; and to regulate and control the use thereof, and to vacate the same, and to authorize or prohibit the use of electricity at, in or upon any of said streets, or for other purposes, and to prescribe the terms and conditions upon which the same may be so used, and to regulate the use thereof." Section 4369, *id.*, provides:

"Any telegraph or telephone corporation or company, or the lessees thereof, doing business in this State, shall have the right to construct and maintain all necessary lines of telegraph or telephone for public traffic along and upon any public road, street, or highway, along or across the right-of-way of any railroad corporation, and may erect poles, piers, or abutments for supporting the insulators, wires and any other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the railroad or highway, or interrupt the navigation of the waters; provided, that when the right-of-way of such corporation has not been acquired by or through any grant or donation from the United States, or this State, any county, city or town therein, then the right to construct and maintain such lines shall be secured only by the exercise of the right of eminent domain, as provided by law; provided further, that where the right-of-way, as herein contemplated, is within the corporate limits of any incorporated city, the consent of the city council thereof shall be first obtained before such telegraph or telephone lines can be erected thereon."

1. The issue involved is succinctly stated by counsel for appellant: "Has the city council the power to refuse the use of its streets to a corporation competent and qualified to erect a telephone exchange within the city?" Counsel have first addressed themselves to constitutional rights, and maintain that section 12, art. 1, of the constitution, *supra*, inhibits municipalities from granting exclusive franchises, and that, as such franchise has been granted to one telephone company by the city, the refusal to grant another to appellant in fact constitutes the first grant an exclusive one; and well-considered authority is cited to sustain the principle that neither the city nor the legislature may grant exclusive privileges. Among them are *Norwich Gas-light Co. v. Norwich City Gas Co.*, 25 Conn. 18; *Attorney*

General v. Cincinnati Gaslight & Coke Co., 18 Ohio St. 262. The argument against the power to grant an exclusive privilege is sound, and is fully sustained in the rule announced by this court in *North Springs Water Co. v. City of Tacoma*, 21 Wash. 517. But the question of the power to grant an exclusive privilege cannot arise here. If the city had attempted to grant such privileges to a telephone company, so as to disable itself from consenting to the construction of another telephone system through its streets, such attempt would be void and beyond its power. The city cannot by ordinance or contract disable itself to consent to the erection of telephone lines upon its streets. The volition to consent or refuse is one of the powers vested by the legislature in cities of the first class, and this continuing power cannot be divested without the sanction of the legislature. The legislature, within constitutional limitations, has sovereign control of the streets and highways of the State and the cities. The primary purpose for which highways and streets are established and maintained is for the convenience of public travel. The use of such highways and streets for water mains, gas pipes, telephone and telegraph lines is secondary and subordinate to the primary use for travel, and such secondary use is permissible only when not inconsistent with the primary object of the establishment of such ways. *Cincinnati Inclined-Plane Ry. Co. v. City & Suburban Tel. Ass'n* (Ohio), 3 Am. Electl. Cas. 443, 27 N. E. 890; *Hudson River Tel. Co. v. Waterliet Turnpike & R. Co.* (N. Y.), 4 Am. Electl. Cas. 275, 32 N. E. 148; *Halsey v. Railway Co.* (N. J. Ch.), 3 Am. Electl. Cas. 283, 20 Atl. 859. It would seem that, within the fundamental limitations mentioned, the legislative control of ways and streets for the secondary use is absolute, and that the legislative discretion in this regard is not subject to judicial intervention. That the legislature may delegate to municipalities such powers and act through their instrumentality is unquestioned. 2 Dill Mun. Corp. (3d ed.) secs. 705, 724; *Pacific R. Co. v. City of Leavenworth*, 18 Fed. Cas. 953 (No. 10,649). The city streets are limited in

dimension. It is apparent that the secondary uses of the streets are physically restricted. When such limit is approached or reached must be determined by some competent authority. The inconvenience, too, of the obstruction of the streets for any secondary uses, and also the breaking up of the solid surface, which is frequently of stone and other expensive material, all suggest the propriety of the control of such uses in the discretion of the municipality. It is further urged that section 19, art. 12, of the constitution declares the right of any corporation or individual to construct and maintain lines of telegraph and telephone within the State, and that such lines are declared to be common carriers, and the right of eminent domain was extended to them. It may be observed that, in the absence of such constitutional provision, telegraph and telephone companies could derive such rights from the legislature, and it may also be seen that the same section imposes the duty on the legislature to provide by general law reasonable regulations to give effect to the section. The important feature of the section seems to be the duty imposed on the right of way of railroad corporations. The section of the constitution, however, is not self-operative, but requires the action of the legislature to give it effect. There is no prescription of rights referable to the roads, highways, and streets of the State. The obvious construction of this provision is that all such rights were left to the discretion of the legislature. The only right absolutely declared is to maintain lines of telegraph and telephone within the State.

2. It may be observed, then, that section 4369, Ballinger's Ann. Codes & St., is pursuant to the constitutional declaration upon the subject of telegraphs and telephones. The statute authorizes the construction and maintenance of all necessary lines of telegraph and telephone for public service along and upon any public road, street, or highway. But when the right of way has not been acquired by grant or donation from the United States or the State, or any county, city, or town, the right must be secured by the exercise of eminent domain; and it is

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further declared "that where the right of way, as herein contemplated, is within the corporate limits of any incorporated city, the consent of the city council thereof shall be first obtained before such telegraph or telephone line can be erected thereon." The contention of counsel for appellant that the statute limits the authority of the city council to reasonable and proper regulations, and to prescribing the method in which telegraph and telephone companies shall construct and operate their lines, cannot be conceded. As has been seen, by another statute, the authority to regulate and of complete control of such lines has been given. The power to refuse is correlative with the power to consent, and such power is plainly authorized by the statute. The first clause of the section grants the easement along any public road, street, or highway, and across the right of way of any railroad corporation, in such manner as not to incommode the public use of the railway or highway. This provision reserves the necessary power of police regulation everywhere in the State, and it has been seen that the same power to regulate and control the use of the street was in apt terms conferred upon cities of the first class. The authorities cited by appellant in *Inhabitants of Summit Tp. v. New York & N. J. Teleph. Co.* (N. J. Ch.), 7 Am. Electl. Cas. 58, 41 Atl. 146, and *Atlantic City Waterworks v. Consumers' Water Co.* (N. J. Ch.), 15 Atl. 583, construe different grants of power and upon different states of fact from those appearing in the case at bar and under our statute. In addition to the reasons suggested heretofore for imposing the powers and duties upon municipalities to control the streets, it is pertinent to refer to the long usage in this country for vesting such authority in municipalities. Such usage is historical, and is expressed in many statutes in the different States and in the mother country. The people of a municipality, who incur and pay the expenses for the construction and maintenance of their streets, and who largely use them, are usually most capable of exercising discretion in the secondary and subordinate purposes for which their streets shall be used. A recent case from the Circuit Court

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of Appeals of the Fourth Circuit (*Southern Bell Telephone & Telegraph Co. v. City of Richmond*, 7 Am. Electl. Cas. 83, 103 Fed. 31), in which the statute of the State of Virginia upon the particular controversy involved is substantially the same as our statute, is very much in point here. Under the Virginia statute the power of the city council to withhold consent or attach any conditions thereto was fully sustained. The judgment is affirmed.

DUNBAR and ANDERS, JJ., concur.

NOTE.—See note 2 at end of Part I.

CITY OF MARSHFIELD V. WISCONSIN TELEPHONE COMPANY.

Wisconsin Supreme Court, April 4, 1899.

(102 Wis. 604.)

TELEPHONE LINE—MUNICIPAL CONTROL.

The right of a telephone company to occupy streets with its appliances is subject in the exercise of such right to the provisions of a city charter that no obstructions shall be placed in streets without the direction and consent of specified municipal officers; and the fact that no ordinance upon the subject of obstructions has been enacted is immaterial.

The court will not usurp the power of the municipal authorities to grant permission to place poles in specified streets.

Cases of this series cited in opinion: *Wisconsin Teleph. Co. v. Oshkosh*, vol. 1, p. 687; *Roberts v. Wisconsin Teleph. Co.*, vol. 3, p. 471; *Hudson River Teleph. Co. v. Waterliet, & Co. Ry. Co.*, vol. 4, p. 275; *Utica v. Utica Teleph. Co.*, vol. 7, p. 67; *Monongahela City v. Monongahela Elec. Light Co.*, vol. 4, p. 53; *State v. Janesville St. Ry. Co.*, vol. 4, p. 289.

Appeal by defendant from order of Circuit Court, Wood county, denying motion to dissolve preliminary injunction.

City of Marshfield v. Telephone Co.

The defendant, the Wisconsin Telephone Company, is a corporation organized under the laws of this State, and is authorized by its charter to build telephone lines and to conduct a telephone business in this State. It maintains 75 different telephone exchanges in the cities and towns of Wisconsin, with wires, strung on poles, connecting said exchanges with each other and with exchanges in other States. It has constructed a line from the city of Stevens Point, westerly, to the city of Chippewa Falls, passing just outside the northerly limits of the city of Marshfield, which was completed in the spring of 1898. It was desirous of establishing a public station in said city, and proposed to construct a line of poles along Central avenue to some convenient point where the station was to be located. Central avenue is the main business street of the city, and has been paved along the business portion thereof, and upon it the greater portion of the travel and business of the city is done. It has been the policy of the city to keep that portion of this street between D and Sixth streets clear of all obstructions, and for more than five years it has uniformly denied to all persons the privilege of placing telephone, telegraph, electric light or other poles in or along the same. In February, 1898, the city granted to R. L. Kraus and K. W. Doege an exclusive permit of 15 years to erect and maintain a system of wires and poles upon the streets of said city, for the purpose of establishing a telephone exchange therein, upon certain conditions, specified in the ordinance, and under the direction of the board of public works. On October 14, 1898, the defendant with a force of men commenced the erection of a run of poles from the intersection of its main line with Central avenue, southerly along said avenue, towards the central and main portion of the city, and placed and set a number of poles therein, without permission of any of the city authorities. The latter objected to this procedure, and under their direction the poles so set were chopped down and removed. Thereupon the city commenced this action to restrain defendants from placing any poles on Central avenue, or in any of the streets of the

city, except under the direction and with the consent of the board of public works; claiming that the digging up of the soil and pavement, and the placing of poles in said street, would be a permanent injury and obstruction thereto. A temporary injunction was obtained and served. Thereupon defendants obtained an order to show cause why the injunctive order should not be vacated. On the hearing the defendants submitted a modified motion, to the effect that, if the court should be of opinion that the defendants should be restrained from constructing their line upon Central avenue, then that the order be so modified as to permit the line to be constructed upon some other streets in said city. Both motions were denied, and the original order was allowed to stand. This appeal is to review the order denying the motion to dissolve the injunction.

Miller, Noyes, Miller & Wahl, for appellant.

P. A. Williams, for respondent.

BARDEN, J. (after stating the facts): Both parties admit the public character of the streets of a city and the almost omnipotent control of the legislature over their use. The city does not own, and cannot alien, its streets. It cannot rightfully authorize obstructions therein without legislative authority. Its duties and obligations with respect thereto are defined in its charter. The general law grants powers and privileges to persons or corporations like the defendant company, to be exercised by municipal consent or subject to municipal limitations. Section 1778, Rev. St. 1898, under the interpretation of this court, authorizes the use of the highways of this State by corporations like the defendant, by their poles and wires, provided they are so set as not to obstruct or incommode the public use thereof. *Wis. Teleph. Co. v. Oshkosh*, 1 Am. Electl. Cas. 687, 62 Wis. 32; *Roberts v. Telephone Co.*, 3 Am. Electl. Cas. 471, 77 Wis. 589. And see *State v. Janesville St. Ry. Co.*, 4 Am. Electl. Cas. 289, 87 Wis. 72. It is conceded by appellant that this section does not deprive

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cities of their power of police control over the manner in which such work shall be done, and that they may adopt, by ordinance, all reasonable regulations for the location and use of telephone poles and wires in the streets. Section 4, subd. 4, c. 160, Laws 1891 (plaintiff's charter), provides that:

"The common council shall have authority by ordinances, resolutions, by-laws or regulations: * * * (26) To lay out, make, open and keep in repair, alter or discontinue, any highways, streets, lanes or alleys, and to keep them free from incumbrances and to protect them from injury. (27) To establish and alter the grades of streets, and to regulate the manner of using the streets in said city, and to protect the same from injury by vehicles used thereon."

Construing similar provisions in the charter of the city of Janesville, this court, in 87 Wis. 72, before cited, said: "There can be no question, at this late day, but that our municipal corporations may make all reasonable regulations for the location and use of electric wires in the streets, and require all reasonable safeguards for the same. The question is virtually settled in this State by our own decisions." The authorities and decisions there cited seem fully to warrant that conclusion. That, in the exercise of this power, the city authorities may go so far as to prohibit the incumbering by telephone poles of certain of its streets, in the exercise of a reasonable discretion, is equally clear. Such right necessarily follows from the grant of the power to regulate. It is also implied from the fact that the dominant purpose of a street is for public passage, and any appropriation of it by a legislative sanction to other objects must be deemed to be in subordination to this use, unless a contrary intent is clearly expressed. *Hudson River Teleph. Co. v. Watervliet Turnpike & Railway Co.*, 4 Am. Electl. Cas. 275, 135 N. Y. 393; *City of Utica v. Utica Teleph. Co.*, 7 Am. Electl. Cas. 67, 24 App. Div. 361. Or, to state the rule in another way: "All legislative grants to private corporations to occupy streets with electrical appliances are impliedly, if not expressly, subject to police powers of the municipality, both to dictate and to change location of such plant." *Monongahela City v. Monongahela Electric Light Co.*, 4 Am. Electl. Cas. 53.

But, it is said, the city of Marshfield has never passed any ordinance or by-law regulating the placing of poles in its streets, and it is argued that, as defendants were not violating any regulation in that respect, this action cannot be maintained. Section 7, c. 11, of the charter provides:

"No building shall be moved through the streets or obstructions be placed therein without a written permit therefor granted by the board of public works. Said board shall have the power to determine the time and manner of using the streets for laying or changing water pipes, or placing and maintaining electric lights, telegraph and telephone poles; provided, however, that the decision of said board in this regard may be appealed to the common council."

This provision gives to the board of public works ample power to exercise control over the streets of the city, subject to appeal to the council. Whether it gives them the power to totally prohibit the incumbering of the streets of the city by telephone poles is not necessary to decide. The city makes no such claim, but it does insist that its streets shall not be so incumbered except under the direction of the proper officers. The record shows that the defendant Gallagher, representing the company, went to Mr. Hoffman, the chairman of the board of public works, about 11 o'clock a. m. of October 14th, and said he was ready with a crew of men, and wished the consent of the board to set a line of poles along Central avenue, from its main line to the business part of the city. He was informed that the chairman had no power to give such consent, that some of the members were out of the city, but that a meeting of the board would be called not later than the evening of that day to act upon such request. Gallagher replied that he was ready with his men to set the poles, and would not wait for such meeting; that his instructions were to set the poles immediately, and he would do so, independent of the board or the other city authorities, which he forthwith proceeded to do until forced to stop. It is such conduct as this that creates and fosters feelings of prejudice against corporations. It was in utter disregard of the city's rights. The city had theretofore granted a franchise for a local exchange.

Under it the local company had a right to use certain of the streets for its poles, under the direction of the board. It cuts no figure in this case that the franchise was exclusive for a limited time. If it was wrong, it did not justify the defendant in committing another wrong. The fact that the common council had adopted no ordinances, or the board of public works had passed no regulations, in relation to pole setting, affords the defendant no justification for its procedure. While it is true the city might have enacted ordinances on the general subject of the incumbering of the street, yet from the very nature of the situation it was impossible to anticipate the needs or desires of a company coming in as the defendant did. Before the board could act intelligently, it was necessary for them to know something about the desires and intentions of parties desiring to use the streets. When the situation had sufficiently developed that the board could act understandingly, it became its duty to act, and to act reasonably. It was likewise incumbent upon the defendant to make its purposes and wishes known to the board, and to give them a reasonable time to take action. The defendant had no right to enter upon the streets of the city, even though no prohibitory ordinances had been passed, and occupy them as it pleased, and set up poles that were obstructions, at will. Its right to go upon the streets with its structures was limited by the charter provisions mentioned, and until it had complied with their requirements, it was without legal justification. Here was a city of 5,000 people, with waterworks, electric lights, a local exchange, and paved streets. Considerations of local pride seemed to demand that their main business street, in the business center, should be kept clear of obstructions or incumbrances. The board had an undoubted right, in the exercise of a reasonable discretion, to prohibit the incumbering of Central avenue with wires and poles. The discretion of that body could be controlled by the council on appeal. It was not within the power of the council to determine the time when or the manner in which defendant might set up its line, except in

the exercise of its appellate jurisdiction over the board. We do not say that the city has the right to entirely exclude the defendant from entering the city, because, under the facts, that question is not before us. We do hold, however, that, before the defendant can occupy any of the streets, application should be made to the board of public works, and a reasonable time given for that body to act. Its action is subject to review by the council on appeal, if not satisfactory. In the exercise of its powers, the council may consider that the rights of the defendant under the general law are in subordination to the police powers vested in the city authorities, and may adopt all reasonable regulations necessary to prevent its streets from being obstructed or incumbered. If it acts contrary to law, no doubt an ample remedy exists.

Defendant's so-called "modified motion" must also fail. The court will not assume to control the action of the board of public works. When a proper and timely application has been made to the board, they may be compelled to act. Until then the court has no right to interfere. The order of the Circuit Court is affirmed.

NOTE.—See note 2 at end of Part I.

STATE EX REL. WISCONSIN TELEPHONE COMPANY V. CITY OF
SHEBOYGAN ET AL.

Wisconsin Supreme Court, June 20, 1901.

TELEPHONE APPLIANCES—MUNICIPAL CONTROL.

Under the statute allowing telephone companies to construct their lines upon or along "highways" and the further statute construing the term "highways," poles and wires may be erected by such companies in the streets of a city, subject to reasonable police regulations.

The right to erect poles being granted by the legislature, the city cannot refuse its consent thereto on the ground that such right is a municipal franchise, or that the streets are already too much encumbered.

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Regulations adopted by the city, under its police power, should be fair and reasonable; they may include the location of poles and wires at certain places; but they may not fix telephone charges, or compel the company to consent to sell its privileges to the city if the city shall so desire, or require the company to allow the city to use its poles and connect with its exchange free of charge.

Cases of this series cited in opinion: *Wisconsin Teleph. Co. v. Oshkosh*, vol. 1, p. 687; *Duke v. Cent. N. J. Teleph. Co.*, vol. 3, p. 546; *Cumberland Teleph. & Tel. Co. v. United Elec. Ry. Co.*, vol. 4, p. 296; *Hudson River Teleph. Co. v. W. T. & Ry. Co.*, vol. 4, p. 275; *So. Bell Teleph. & Tel. Co. v. Richmond*, vol. 6, p. 1; *Roberts v. Wisconsin Teleph. Co.*, vol. 3, p. 471; *Marshfield v. Wisconsin Teleph. Co.*, vol. 7, p. 103; *Krueger v. Wisconsin Teleph. Co.*, vol. 7, p. —; *Michigan Teleph. Co. v. Benton Harbor*, vol. 7, p. 9; *St. Louis v. Bell Teleph. Co.*, vol. 2, p. 44; *N. W. Teleph. Exch. Co. v. Minneapolis*, vol. 7, p. —.

Appeal by plaintiff from a judgment of the Circuit Court, Sheboygan county, overruling demurrer to return in mandamus proceeding.

The relator, the Wisconsin Telephone Company, presented to the Circuit Court of Sheboygan county its petition for an alternative writ of mandamus, setting out the following facts: The relator is a Wisconsin corporation, organized in 1882, conducting a telephone business and maintaining telephone lines and exchanges in this State. The defendant city of Sheboygan is a municipal corporation, and the other defendants mayor, clerk, and aldermen of said city. The petition sets out the charter provisions regarding control and regulation of city streets, and that in 1893 the council adopted an ordinance providing that the location and erection of all poles, etc., should be subject to the approval of the city authorities, and that the occupation of all streets not already occupied should be upon a plan submitted and approved by the common council. In 1882 the relator established an exchange in the city of Sheboygan, which was a part of its State system, and connected with other exchanges east of the Mississippi and north of the Ohio rivers. The exchange was established without any grant of authority or permission from the city, but its poles were put up and wires strung with its knowledge and consent, and without objection, until 1893, when

a competing line was built under an ordinance, a copy of which was attached. Since that time the city has insisted that relator had no right to place any additional poles upon any of its streets without permission, has refused to consent to the location of any poles, or to the extension of its system, has used force to prevent the same, and has seriously interfered with the making of necessary repairs. Since 1893 relator's exchange has not been, and is not now, in accord with the most approved plan of telephone construction, in particulars fully set out. There are many places in the city which cannot be supplied with telephones as the lines are now located, and cannot be reached without setting up additional poles. Relator has been and is now desirous of perfecting its system, extending its lines, and making the same according to the most approved plan of telephone construction. On September 11, 1899, the relator presented to the mayor and common council a petition stating its desires, and a willingness to conform to any and all reasonable requirements or changes thought necessary or desirable in its proposed plan. Attached to the petition was a map of the city showing the location of its poles, the changes proposed, and extensions contemplated. The city authorities were asked to approve the plan and grant permission for the proposed extensions and changes, and, if the plan was not approved, to suggest such changes therein as were deemed for the best interests of the city. Such petition was referred to a special committee of the council. After a conference with the representatives of the company, the committee reported that the latter refused to accept a franchise on the same conditions granted to the Northwestern Telephone Company, which was the competing company before referred to, and recommending that action on the petition be temporarily postponed. Such report was adopted, and no further action on said petition has been taken. The petition herein further sets out that relator was willing to accept a franchise which conformed to the one mentioned except so much of the same as assumed to regulate the rate of telephone charges, and except as to

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the following requirements: A provision that, should the city desire to purchase the exchange at a price to be fixed by appraisers, it would convey its exchange to the city; the use of the top 30 inches of all poles for the police and fire alarm or other electric system, free of charge; a condition that, in case the company failed to maintain and operate its exchange, its rights should be forfeited, and its property and poles therein used by the city should become the property of the city; and, lastly, in case the city should construct an exchange for the use of its officials, and not for private use, the city should have the right to connect its exchange with that of relator's, and have the same right to use its telephones in connection with relator's as are given to its patrons, free of charge. The refusal of the city to approve the plan presented prevents the relator from making the changes and extensions desired, and, unless the city be required to take action thereon, relator has no remedy in the premises. An alternative writ of mandamus was issued, to which the defendants made due return. After many additions and denials, the return sets out that the petition, map and plan of relator before referred to was intended by relator to constitute, and would in law constitute, if approved by the city, a grant or franchise to use the streets and alleys named for its purposes, and that no application for such franchise had ever been published in the official paper of the city, as required by section 940b, Rev. St. 1898; that the action of the council on said petition was not based solely upon the refusal of relator to accept a franchise fixing rates, but was based upon the power, authority, and discretion, of the common council to require and enact reasonable regulations and by-laws, such as were contained in the franchise granted to the other company, and embodying the conditions hereinbefore mentioned. The return also sets out that the streets of the city are now, and since 1896 have been, incumbered and obstructed to a great extent by the poles of the different telephone, telegraph, electric light, and electric street railway companies, and by poles belonging to the

city used for its fire alarm system; and that a prudent exercise of the power vested by law in the council requires that a change be made in the mode of running wires, and that they be required to run underground as soon as practicable. It also sets out that relator has not and cannot obtain the consent of lot owners to place poles in the streets, and has not the power of eminent domain, and that the granting of the petition would be vain and nugatory. Further, that the relator's exchange was erected without right; is defective and inadequate; a source of annoyance and a nuisance to the inhabitants; is being maintained to create a monopoly; and to compel the other company to either raise its rates, go out of business, or consolidate with relator, and to that end has refused to submit to any regulation fixing charges and has offered its telephones free of charge. The field is limited as to patronage, and a franchise to relator without regulation as to charges would result in impairing the efficiency of service, or in the insolvency or consolidation of the companies. It was to prevent this disastrous condition of affairs, and because the council did not wish to legalize the present unlawful structures of relator in the streets, that the petition of relator was refused. The right to deny the petition as a matter of discretion was also claimed. By further allegations the defendants disclaim the right to control through or long-distance business of the company, but insist that local business may be continued under reasonable regulations. The return sets out an ordinance adopted in 1893 regulating the erection of poles and the stringing of wires for the transmission of electricity, being sections 183 to 216. Section 187 provides that the exact location of all poles shall be subject to the approval of the proper city authorities, and that the occupation of all streets not already occupied shall be upon a plan to be approved by the common council. A demurrer to the return on the ground that it did not state facts sufficient to constitute a defense to the issuance of the writ was overruled. In a lengthy written opinion, the trial judge bases his ruling largely upon non-compliance with section 940b. The relator appeals from the order overruling the demurrer.

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Miller, Noyes & Miller, for appellant.

T. M. Bowler, City Attorney, for respondents.

BARDEN, J. (after stating the facts): The relator is a Wisconsin corporation organized for the purpose of establishing, maintaining, and operating a system of telephones in this State. It has such powers, and is subject to such restrictions and regulations, as are granted and prescribed by law. Its authority to use and occupy the streets and highways of the State is granted by section 1778, Rev. St. 1898, which came into existence in 1848. So far as is material to this litigation such section reads as follows:

"Any corporation formed under this chapter to build and operate telephones, or conduct the business of telegraphing, may construct and maintain any such lines with all necessary appurtenances, from point to point upon or along or across any public road, highway or bridge or any stream or body of water, or upon the land of any owner consenting thereto, and from time to time extend the same at pleasure; . . . but no such telegraph line or any appurtenance thereto shall at any time obstruct or incommode the public use of any road, highway, bridge, stream or body of water."

The right of a telephone company to organize, to erect lines, and to do business under our laws, and especially under section 1778, was first challenged in the case of *Wisconsin Teleph. Co. v. City of Oshkosh*, 1 Am. Electl. Cas. 687, 62 Wis. 32. That right was vindicated in an opinion by the present chief justice, and which has been cited with approval in many jurisdictions. *Duke v. Telephone Co.*, 3 Am. Electl. Cas. 546, 53 N. J. Law, 341; *Cumberland Telephone & Telegraph Co. v. United Electric Ry. Co.* (C. O.), 4 Am. Electl. Cas. 296, 42 Fed. 273, 12 L. R. A. 544; *Hudson River Teleph. Co. v. Watervliet Turnpike & Ry. Co.*, 4 Am. Electl. Cas. 275, 135 N. Y. 393; *Southern Bell Telephone & Telegraph Co. v. City of Richmond* (C. C.), 6 Am. Electl. Cas. 1, 78 Fed. 858. This court has sanctioned the doctrine stated in *Roberts v. Teleph. Co.*, 3 Am. Electl. Cas. 471, 77 Wis. 589; *City of Marshfield v. Wisconsin Teleph. Co.*, 7 Am.

Electl. Cas. 103, 102 Wis. 604; *Kreuger v. Same*, 7 Am. Electl. Cas. —, 106 Wis. 96. The exact nature and scope of the power thus conferred has at no time been definitely treated. In the *City of Oshkosh* case this court held that a telephone company might lawfully organize under chapter 86, and construct and operate its lines under section 1778, and it was there said that the company was occupying the street "not only by express grant of the legislature, but by express permission of the city authorities." In the *Roberts* case the contest was whether poles set by the company were unlawful structures in a highway. In disposing of this question COLE, C. J., remarks: "Was it lawful to place these poles in the highway? The statute authorizes any corporation formed to build and operate telegraph lines or conduct the business of telegraphing to construct and maintain its lines, with all necessary appurtenances, along a public highway." Section 1778. And in *Wisconsin Teleph. Co. v. City of Oshkosh*, 1 Am. Electl. Cas. 687, 62 Wis. 32, it was held that "the statute included telephone companies, although such companies were not specifically mentioned therein. The poles, then, were not unlawful structures in the highway, but were authorized by law to be set therein." In the *City of Marshfield* case we said the section in question authorized the use of the highways of the State by poles and wires, provided they were set so as not to obstruct or incommode the public use thereof. In the *Kreuger* case we held the statute granted no power to use the street except as against the public. Under it the public were foreclosed of the right to object to the poles being in the street, but the lot owner might pursue his legal remedies. Several of these cases related to the right to place poles in the city streets, and it was assumed that the word "highway" was broad enough to and did cover the streets of a city. That proposition is now disputed by the defendants. We will not pursue their argument. Section 4971 is to the effect that in the construction of statutes the word "highway" may be construed to include any road laid out by the authority of any town, city, or village. In view of the course of

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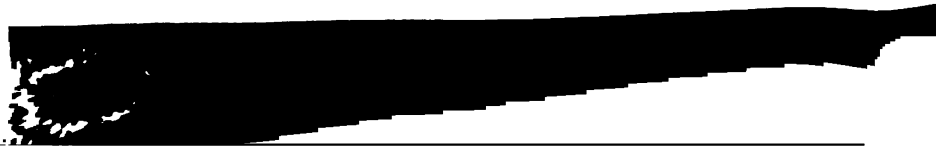
decisions and the importance of the rights involved, we see no good reason for turning from the position tacitly assumed in the cases noted. We therefore hold that the word "highway," as used in section 1778, covers the streets and ways of a city, as well as rural highways. We find support in this conclusion in a recent case in the Federal court, construing a somewhat similar statute of Minnesota. *Abbott v. City of Duluth* (C. C.), 104 Fed. 833. A still more recent and extended discussion of the same statute by the Supreme Court of that State may be found in *Northwestern Teleph. Exch. Co. v. City of Minneapolis*, 86 N. W. 69, where the same conclusion is reached. The right to construct and maintain poles in city streets is as ample and positive as to build in the country highways, except that it may be subject to stricter police regulation, as will be more fully discussed in a subsequent portion of this opinion. Not one of the cases referred to can be justified except upon the theory that the statute in question grants to corporations of this kind a franchise,—a special privilege, which could not be legally exercised without legislative authority. Under it, great corporations have been organized, vast sums of money have been expended, thousands of miles of poles and wires have been erected, and the systems are being extended until the remotest hamlet in the State may communicate with the business centers with the utmost ease. So far as we are aware, this is the only statute from which the authority and power mentioned arises. It came from the ultimate source of power, the legislature, and passed directly to such organizations as come within its terms. The trial court reached a somewhat different conclusion. His reasoning runs thus: The right to use the streets is a franchise. No franchise can be enjoyed or held which is not derived from the State. The legislature may delegate to municipal corporations power to make by-laws and ordinances which shall have the force of legislative acts. The charter of the city of Sheboygan gives the common council authority to control its streets, to make ordinances for the government and good order of the city and for the benefit of trade and commerce.

In the City of Marshfield case this court held that section 1778 did not deprive cities of their power of police control over the manner in which the work of such corporations shall be done, or of the power to regulate the location and use of poles and wires in the streets. The city, therefore, having the power to regulate, control, and to prevent the incumbering of certain of its streets in the exercise of a reasonable discretion, when called upon to exercise these powers, or take action as requested by relator's petition, was granting a franchise. Section 940b, Rev. St. 1898, provides that no franchise shall be granted by any village board or common council until the application therefor, containing the substance of the privileges asked for, shall be filed with the village or city clerk, and be published in the official paper. The relator failed to comply with these requirements, and hence the return states a good defense. In reaching this conclusion the court failed to keep in mind the distinction between the rights or franchises granted by the State and the power of police control possessed by the city. As we have already seen, the power to exist as a corporation, and to exercise the franchise of the use of highways and streets, as against the public, was already possessed by the relator. The city had no power to add to or detract therefrom except in the exercise of its police power. The franchise existed by express legislative grant. Its exercise might be controlled only in recognition of its existence, and in conformity with a just and reasonable administration of the police power in the interests of the city and its inhabitants. In a sense, the city was called upon to grant a privilege. It had the power to regulate the use of its streets. It might deem it improper to allow poles to be set along some of the streets included in the proposed extensions. It might designate other streets, and thus exercise a reasonable discretion in the interests of its people. But such privileges was controllable only in harmony with the rights both possessed. In no proper sense was the privilege sought a franchise, within the meaning of section 940b. The consent of the city was only required or asked in view of its

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right to regulate. Having that power, it was its plain legal duty, when a plan had been submitted as its ordinance required, to take such action thereon as reason and a proper regard for the interests and legal rights of all concerned would seem to suggest. It was no answer for the city to say, as it did in general terms in its return, that the streets of the city were already incumbered by poles and wires, and that a due regard for the safety and convenience of its people rendered it prudent that a change be made "as soon as possible" in the manner of running wires used for electric purposes from poles to an underground system. If the time had arrived, and the exigencies were such, that such a change was necessary, it was its duty to act, and to adopt such plan as reason and enlightened judgment might suggest. In the first case in which this court was ever called upon to consider the reciprocal rights of the company and the city, a line was blazed with accuracy, and has since been followed in all the cases. The charter of Oshkosh contained a provision broader in terms than any contained in defendant's. It gave the common council authority "to regulate, control and prohibit the location, laying, use and management of telegraph, telephone and electric light and power wires and poles." In disposing of the question raised, this court said: "But we do not think this was designed as giving to the municipality absolute authority to exclude such companies altogether from carrying on or operating their business within the corporate limits of the city, but simply to regulate the same, and to prohibit such location in improper places; otherwise the municipalities of the State would have the power to nullify what the legislature had expressly authorized. Undoubtedly, the common council, under the charter, had a right to regulate, in order to guard and secure the public safety and convenience; but their regulations, to be valid, should have been reasonable and fair, and not have gone to the extent of confiscation, nor of wholly excluding the plaintiff from the city." *Wisconsin Teleph. Co. v. City of Oshkosh*, 1 Am. Electl. Cas. 687, 62 Wis. 32-40. The police power possessed by the city, as said

in *Chicago, M. & St. P. Ry. Co. v. City of Milwaukee*, 97 Wis. 418, extends to the protection of the lives, health, and property of citizens, and to the promotion of good order and good morals. It is not easy of exact definition, or possible to fix upon it exact limitations or restrictions. "It is easier to perceive and realize the existence of this power than to make its boundaries, or to prescribe limits to its exercise." *Com. v. Alger*, 7 Cush. 53. It arises under what has been termed "the law of overruling necessity." But it has its limitations. Certainly, its exercise must be reasonable, and calculated to promote the ends suggested. *Hayes v. City of Appleton*, 24 Wis. 544; *Barling v. West*, 29 Wis. 307. Neither the city nor the State can destroy, or essentially modify, corporate franchises, except as the power is reserved in the original grant or by the constitution. They may regulate the mode of doing business with reference to the comfort, welfare, and safety of society, but cannot, under the pretense of regulating, take away any of the essential rights and privileges which the charter confers. In the exercise of its police power to control and regulate its streets, the city passed an ordinance providing that the location of poles should be subject to the approval of the proper authorities, and that the further occupation of its streets should be upon a plan to be approved by the council. This was reasonable, and the relator cannot and does not object to it. In the petition presented to the council it signified its readiness to conform to all reasonable requirements, and, if the plan presented did not meet with approval, it was ready to change the same to meet the wishes of the authorities. But the city seeks to go much further. It, in effect, says to relator that: "Before you can make any changes, or extend your system, you must consent to an ordinance fixing rates of charges to patrons. You must consent to sell your privileges at an appraised value in case the city shall desire to purchase. You must consent to the free use by the city of the top thirty inches of all poles for its police and fire alarm system. In case you shall fail to operate and maintain your exchange, any poles or



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property in any way used by the city shall become its property. And, finally, if the city shall construct and operate an exchange for the use of its officers and departments, it shall have the right to connect with your exchange, and have the rights, privileges, and service given other subscribers, free of all rental charges." These, in brief, are the conditions insisted upon by the city that shall be accepted by the relator, and are set up in the return as an excuse for not obeying the writ. The relator insists that the city has no power to impose any such conditions. None of them can be justified unless they can be said to fairly come within the purview of police regulations. The argument in behalf of the city is based entirely upon the power of the city to regulate and remove encroachments on its streets and to regulate trade and commerce. The fixing of maximum charges for use of telephone service in the city is said to be a lawful police regulation to prevent extortion. That is based upon the assumption that the power of police control possessed by the city is unlimited. Such is not the fact. Such power is inherent in the State, and is a necessary attribute of sovereignty. It does not pass to the minor divisions of government except by express grant, or by necessary implication from other powers granted. Every citizen holds his property subject to the proper exercise of this power either by the State legislature directly, or by public or municipal corporations to which the legislature may delegate it. 1 Dill. Mun. Corp. sec. 141. Speaking on the general proposition, the same learned author states the rule thus: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessary or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation, not simply connected, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied." Section 89. That rule has been substantially adopted and ap-

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proved in this State. *Hayes v. City of Appleton*, 24 Wis. 542; *Gilman v. City of Milwaukee*, 61 Wis. 588; *Bell v. City of Platteville*, 71 Wis. 139; *Kilvington v. City of Superior*, 83 Wis. 222, 18 L. R. A. 45; *Becker v. City of La Crosse*, 99 Wis. 414. Whatever power a municipality possesses over the wires and poles of a telephone company in its streets must be granted it by the legislature. Section 698. The charter of the city of Sheboygan empowered it to enact proper ordinances and regulations for the government and good order of the city, for the benefit of trade and commerce, for the suppression of vice and the prevention of crime, to prevent the incumbering of streets, to provide for the removal of obstructions therein, to regulate the manner of using streets, and to protect them from injury. As we have already seen, this grant of power does not authorize the city to wholly prevent the relator from doing business within its limits. No express authority is given the city to regulate charges for telephone service, nor is there any express grant of power from which such authority can necessarily be implied. Construing the charter and the statute in the light of the rules of law stated, the city has authority to exercise its police power to protect the public from unnecessary obstructions, inconvenience, and danger, and to determine in what manner the relator may erect its poles so as to accomplish this result. *Michigan Teleph. Co. v. City of Benton Harbor* (Mich.), 7 Am. Electl. Cas. 9, 80 N. W. 387. It has no authority to impose other conditions. That power rests in the legislature. The power to regulate charges was not included in or incidental to the power to regulate the manner of using streets. There is not the remotest relation between them. The attempt of the city to justify its position on that ground must fail. *City of St. Louis v. Bell Teleph. Co.*, 2 Am. Electl. Cas. 44, 96 Mo. 623. The case of *City of Allegheny v. Millville, E. & S. St. Ry. Co.*, 159 Pa. 411, cited by defendants, has no application here. It was based upon the ground that under the constitution of Pennsylvania no street railway shall be constructed within the limits of a city

without the consent of the local authorities. For that reason the imposition of a condition regulating rates of fare was justified. Neither does the power come to the city under the general authority to pass ordinances for the government and good order of the city and for the benefit of trade and commerce. To say that under this general power the city may fix rates for telephone service would be going entirely too far. The charter otherwise points out the cases in which the city may exact licenses and fix rates, and any attempt to extend the power would be running directly in the face of the rule laid down by this court in the City of Oshkosh case. What has been said applies with almost equal force to the other conditions insisted on by the city. We do not see how, under the power it now possesses, the city can rightfully withhold action, or base affirmative action on the condition of financial benefits to itself. Such contention must rest largely upon the supposed exercise of power to grant or refuse the right to use the streets. This, of course, the city has no right to do except when the situation is brought within the rule stated in the City of Marshfield case. We need not repeat what was there said relative to the right of the city to prohibit the erection of poles on certain of its streets. Such right must be exercised in the light of reason; not with a view of prohibiting the company doing business in any given locality, but reasonably to protect the public against unnecessary obstructions, inconvenience, and dangers, for the general welfare and common protection of all. The right to purchase relator's exchange, if granted, would be a contract right of great value. So, also, as to the right to use the tops of the poles for the fire alarm system, and the agreement as to the forfeiture of property to the city in case of nonuse. Such rights have no relation to the legitimate exercise of the power of police regulation. To permit the city to base its action upon considerations of financial benefit to itself would be allowing it to put its powers up for sale to the highest bidder. Nothing could be more vicious. Very soon the interest of the public would be at the mercy of local boards. The com-

pany willing to yield the greater number of privileges or pay the most money would get the greatest favors. The embarrassments growing out of a recognition of the existence of this right are so manifest and so manifold that we need spend no time in discussing them. We say without hesitation that the city has no right to barter with the police powers, or exact for itself financial benefits as a condition for its exercise. Such power must be exercised for the public good and public welfare, and not for public gain.

The further contention that the city may refuse action on the ground that ruinous competition in telephone rates would result, cannot be sustained. The city has no express or implied power to legislate on this subject. Its power to regulate trade and commerce does not extend to controlling competition. Such power as it possesses must be exercised within the lines already suggested, and cannot be extended to cover municipal fears or to control mere matters of local competition. The course followed by relator is substantially that mapped out by this court in the City of Marshfield case. It presented its petition with a plan of its proposed improvements and extensions. It signified its willingness to submit to such changes as were deemed for the best interest of the city. It then became the duty of the city to take affirmative action. What that action should be the court has no power to declare. It can only say, "Act, and let such action be in harmony with the powers granted in the charter as herein construed." Considering the return as a whole, we do not think it presents any question of fact for trial, or any legal justification for failing to obey the commands of the writ. The order appealed from is reversed, and the cause is remanded, with directions to sustain the demurrer to the return, and for further proceedings according to law.

NOTE.—See note 2 at end of Part I.

THE STATE V. WILLIAM TOWERS, STREET COMMISSIONER.

Connecticut Supreme Court of Error, March 30, 1899.

(71 Conn. 657.)

TELEPHONE SUBWAYS—MUNICIPAL CONTROL.

The statute incorporating a telephone company empowered it to lay its wires underground, provided it interfered with no street use and that in excavating it should conform to the regulations of the common council. The city charter gave the common council exclusive control of excavations in streets. Application for mandamus to compel the city to give the company permission to excavate streets for conduits:

Held, properly denied, the return showing that the city had under consideration the matter of putting underground all the wires possible, and was investigating, and devising means to accomplish it with the least interference with street uses.

Application by the State's attorney for Hartford county for a writ of mandamus requiring the street commissioner of the city of New Britain to give his written consent to the excavation of a certain street for the purpose of laying telephone ducts and wires, brought to the Superior Court of Hartford county, and tried by the court, THAYER, J., upon demurrer to the respondent's return, the court overruled the demurrer and, upon refusal of the relator to plead further, rendered judgment denying the application and the relator appealed for alleged error of the court. *No error.*

The application referred to the charter of the Southern New England Telephone Company, as found in volume IX, p. 605, Special Laws, and to an amendment of its charter, as set forth in volume 10, p. 837, Special Laws; and alleged that the said company had done, and was ready to do, all those things which, under its said charter and the amendments, entitled it to have, and made it the duty of the defendant to issue to it, his written consent to lay its "wires, and conduits for its wires, in, through and under any public street" in the city of New Britain, and

that the said company had made request to the defendant to give his written consent therefor, which he refused. The State's attorney moved the court to issue a writ of mandamus requiring the defendant to give his written consent as aforesaid. The court issued an alternative writ, which was duly served; and, on the day named, the parties appeared in court, and the defendant made return as follows: "Said William Towers, street commissioner of the city of New Britain, in obedience to a rule of this court ordering him to give his written consent, as such street commissioner, to the Southern New England Telephone Company, for the opening and excavating by said company in Church street, in said city of New Britain, on the north side thereof, between Elm and Main streets, in order that said the Southern New England Telephone Company may put into such openings and excavations a conduit, underground, for the purpose of laying and holding therein ducts and telephone wires, and may also build and maintain manholes to said conduits, and may also put in said openings and excavations lateral ducts, or small conduits, running from the main conduits to the curb, or signify cause to the contrary thereof to this court on the first Tuesday of December, A. D. 1898, now appears in court, and, for cause why his written consent should not be given as above stated, shows as follows, to wit: (1) The city of New Britain was incorporated by an act of the general assembly of this State approved July 15, 1870, which act was duly accepted by a majority of the freemen of the borough of New Britain at a meeting held on the 13th of January, 1871, which acceptance was ratified by an act of said general assembly approved June 16, 1871. (2) Said city was reincorporated by an act of the general assembly, approved April 14, 1885, which act was in full force from the date of said approval until June 6, 1895. (3) Said city was reincorporated by an act of the general assembly, approved June 6, 1895; and by the provisions of said act, as well as by the provisions of the act approved April 14, 1885, the

common council of said city had, and there is still vested in it, the sole and exclusive authority and control over all streets and highways, and over all parts of streets and highways, within the limits of said city. (4) And by the provisions of such act, as well as by the provision of the act approved April 14, 1885, the common council of said city was authorized to pass orders and ordinances concerning the excavation or opening of streets, highways, or public grounds in said city for public or private purposes, and the location of any work therein, whether temporary or permanent, upon or under the surface thereof. (5) Chapter 21, sec. 8, of the ordinances of said city, passed by the common council of said city pursuant to the power given it by the provisions of said act of 1895, provides "that every person who shall without the consent of the street commissioner or of the common council, dig up or excavate any portion of the streets, highways, sidewalks, or gutters of said city, or shall place therein any earth, stones, rubbish, or other obstruction to the public use or travel, or shall assist or abet in any of said acts, shall be guilty of a misdemeanor, and shall for such offense pay a penalty of ten dollars (\$10.00); and said ordinance was in force on and prior to the 8th day of May, 1898, and has ever since been, and now is, in full force and effect; and this defendant denies that section 9, c. 21, of the ordinances of said city referred to in the alternative writ, is the only ordinance of said city concerning the opening of streets for the purpose of laying pipes, wires, or sewers therein, but the only ordinances conferring any power upon the street commissioner to give his consent to opening or excavating streets for said purposes are in chapter 21, secs. 8, 9. (6) The street commissioner of said city is appointed by the common council thereof, and is subject to the orders and directions of said common council. (7) The said Southern New England Telephone Company has never obtained the consent of the city of New Britain, or of the common council thereof, to lay and maintain underground wires, conduits, and ducts, or any underground work whatever, in Church street, in

said city, between Elm and Main streets, and for that purpose to make excavations and openings in said street, or any portion thereof; but, on the contrary, on the 8th day of May, 1898, said telephone company applied to the common council of said city for permission to open the surface of Church street from its intersection with Elm street to its intersection with Main street, for the purpose of laying ducts, building manholes, handholes, and curb lateral ducts to contain the wires of said company, and permission was refused by said council; and no further application has been made to said council for like permission since the refusal of the application of May 8th, 1898. (8) The portion of Church street referred to in said application of May 8th to the common council of said city was the same portion referred to in the application made to this defendant on the 4th of November, 1898; and the permission sought of, and refused by, said common council, were for the same work for which permission was asked of this defendant in the application of November 4th. (9) The city of New Britain has a population of twenty-five thousand and upward; and there are in and along the streets of said city, including Church street, between Main and Elm streets, other than the wires of said telephone company, overhead wires for telephonic, telegraphic, fire alarm, and electric lighting purposes. Church street is one of the main thoroughfares of said city, especially between Main and Elm streets; and that portion of said street has, at much expense, been macadamized by said city, and is extensively used for public travel. (10) Said city desires, so far as practicable, to get underground all the overhead wires now in use in said city; but it desires to attain that end by a plan whereby there shall be as few conduits and ducts as possible, and whereby public travel upon the streets and highways, and the sewers and gas and water pipes under the surface of said streets, shall be the least interfered with; and the common council of said city does not deem it for the best interests of said city or of the public that the Southern New England Telephone Company shall lay its

conduits and ducts for its exclusive use, and under its exclusive control, without any regard to a uniform system that may be adopted for all the wires in said city, or the greater part thereof. On or about the 16th of February, 1898, the common council of said city appointed from its own body a committee to investigate the subject of the provision by the city of a conduit or subway in the central portion of the city, into which should be placed the wires of the various telegraph, telephone, and electric lighting companies, as well as the city fire alarm; and on the 16th of March, 1898, said Southern New England Telephone Company made application to said council for permission to open certain streets in the central part of said city, including Church street, between Main and Elm streets, for the purpose of laying conduits and ducts for its wires, and said application was heard by the committee. Said common council, through its said committee, signified to said telephone company its willingness to consider and adopt, under reasonable regulations, plans relating to said underground wires, and the laying of conduits and ducts for the use of the wires of said company, and for overhead wires, in said city, but said telephone company insisted that, under the said amendment to its charter, it has the absolute right to lay conduits and ducts for its exclusive use, and under its exclusive control, and refused to submit to any regulations that might be made by said council whereby other overhead wires should be taken into the conduits and ducts of said company, or whereby the wires of said company should be taken into the conduits built by said city. Wherefore said council, acting, as it claims, in the interest of, and under the power given it over the streets and highways of, said city, on the 4th of May, 1898, refused the application of said telephone company, and refused, also, a subsequent application of said company made on or about May 8th, 1898, to open Church street, between Main and Elm streets, for the purpose of building conduits and ducts for its wires. Said telephone company insisted that its application made to this defendant on the 4th of Novem-

ber, 1898, should be granted without any regulations restricting the exclusive use and control by it of its conduits and ducts. (11) Said common council, since the said application of said telephone company, has had, and still has, under consideration the matter of underground wires in said city, and is by a proper committee investigating the plans and methods in use in other cities, and intends, within a reasonable time, which has not yet expired, to make, by a proper ordinance, reasonable regulations for putting underground as many as possible of the overhead wires now in use in said city, in such a manner as to interfere as little as possible with the use of the streets for public travel and other purposes. (12) Wherefore, for each and all the causes and reasons herein set forth, the defendant insists that a writ of peremptory mandamus should not issue as prayed for in said application, and prays the judgment of the court that he may be hence dismissed." To this return, a demurrer was filed, assigning various reasons therefor. Upon hearing, the court overruled the demurrer, found the issue for the defendant and that the return was sufficient, and, there being no further pleadings, adjudged that a peremptory writ be denied. The State's attorney appealed to this court. The only error assigned is that the court erred in overruling the said demurrer. No error.

John W. Alling and James T. Moran, for appellant.

Frank L. Hungerford, for appellee.

ANDREWS, C. J. (after stating the facts as above): The application in this case is brought in the name of the State's attorney alone. It would have been in better form had the telephone company been named as the relator. The injury complained of was one which affected that company only. It did not affect any persons in common, nor the public generally. In such cases the party injured is properly named as the relator. The writ of mandamus is, in this State, so much of a prerogative writ that it ought regularly to issue only in the name of the State (*Lyon*

v. Rice, 41 Conn. 245; *Peck v Booth*, 42 Conn. 271), or by special authority of the State, as in *Woodruff v. Railroad Co.*, 59 Conn. 63. But it is issued in cases where there is a private right to have a public duty performed, and where there is no other adequate remedy. *Bassett v. Atwater*, 65 Conn. 355, 361; *Brainard v. Staub*, 61 Conn. 570. In these cases the party aggrieved should be the relator. High on Ex. Rem. sec. 430. The point is not of any consequence in this case. The telephone company, although not named as such in the application, has been treated and spoken of as the relator during the whole proceeding. And we have followed the same terms.

It is undoubtedly the true rule that, wherever the performance of some municipal duty is sought to be compelled by a writ of mandamus, the writ should be directed to that officer or board of municipal government which is specially charged with the performance of the thing ordered to be done. *Farrell v. King*, 41 Conn. 448; *State's Attorney v. Selectmen of Branford*, 59 Conn. 402; *State v. County Com'rs*, 68 Conn. 16; *Williams v. City of New Haven*, 68 Conn. 263; *State v. Williams*, 68 Conn. 131. If the municipal corporation has no such officer or board, then the writ may be directed to the municipality, by its corporate name. *Williams v. City of New Haven*, 68 Conn. 263; Dill. Mun. Corp. sec. 861, and note.

But mandamus confers no new authority, and it must appear from the record that the party to be coerced has power to perform the act commanded (*Brownsville v. Loague*, 129 U. S. 493, 501; and without such power the writ ought not to issue. In looking through the present record, we do not find that Mr. Towers, as the street commisisoner, was charged with any duty, or had any authority, to give to the relator any written consent to do in Church street, in said city, those things which the relator claims the right to do there. The alternative writ does not show such power, while the return expressly denies that Mr. Towers had any such authority, or any authority at all in the premises, independently of the common council, whose servant

he is, and alleges that the common council had refused permission to the relator to put its wires into said street. The conduct of the relator itself in this behalf would indicate that its legal advisers did not quite believe that the present defendant had the power to give it the permission it asked. It made application in the first place to the common council for permission to lay its pipes in Church street, and was refused. It then applied to the present defendant. The defendant is the servant of the council, and has no authority except such as that board gives him. The council had not given him authority to consent to the relator's claim.

The amendment to the charter of the relator, under which it makes its claim, is this:

"Section 1. The Southern New England Telephone Company, a corporation organized under an act of the general assembly of Connecticut (approved April 19, 1882), is hereby authorized to lay and maintain its wires, and conduits for its wires, in, through, and under any public street or highway in any city, borough, or town in which said company now maintains, or may hereafter maintain, its telephones and wires, and it may construct and maintain manholes and ventilating shafts in connection with such conduits, provided such wires, conduits, manholes, and shafts are so constructed that when completed they will not interfere with the ordinary use of such streets and highways by the public, and provided that in the construction of such conduits and the laying of such wires no gas or water pipes and no sewer shall be removed or changed in such manner as to interfere with the uses for which such pipes and sewers have been laid.

"Sec. 2. Whenever said company shall enter upon or open any street or highway under the provisions of the foregoing section, it shall conform to such regulations of the common council of any city, the warden and burgesses of any borough, or the selectmen or other authorities of any town, as they may prescribe concerning the opening of streets for the purpose of laying pipes, wires, or sewers therein; and when the work of laying such wires and conduits has been completed in any town, borough or city, it shall be the duty of said company to restore the streets or highways in which such wires or conduits have been laid to as good a condition as they were when said streets were so opened, for said purposes, by said company, to the satisfaction of the authorities thereof." Laws 1889, p. 837.

The relator insisted that, under the aforesaid amendment to its charter, it had the absolute right to lay conduits and ducts, for its exclusive use, and under its exclusive control, in the

streets of New Britain, and especially in Church street, and refused to submit to any regulations that might be made by the common council of said city whereby other overhead wires should be taken into the conduits and ducts of said company, or whereby the wires of the said company should be taken into the conduits built by the city. The relator said that, by the proper construction of its amended charter, it had the right to so insist, and that it was the duty of the authorities of the said city to give it permission so to do, without any regulation restricting its exclusive use and control of its conduits, wires, and ducts. We are not able to agree with the relator in this construction. While the relator is a public corporation, in the sense that it must give all persons the same measure of service for the same measure of money, yet, in the sense that it performs any public duty or any public service, it is not a public corporation. It renders no service for which it does not require full pay. It is not seeking to put its wires underground in Church street, in the city of New Britain, or in any other street, from any public motive. It is seeking to make gain. It is acting, not upon compulsion, but for its corporate profit. It seeks to increase its private income. If it does any public benefit, that is merely incidental. The right which it has to lay its wires underground in the highways, however it is to be exercised, is to it a valuable franchise, for which it has paid nothing. It is a franchise the granting of which encroached to some extent upon the rights of the public in the highways. All such grants must be strictly construed against the grantee. *Wisconsin Cent. R. Co. v. U. S.*, 164 U. S. 202; End. Interp. St. 354. The primary purpose for which a street is laid out and maintained is for a highway,—a place common to all for passing and repassing, on foot and in vehicles, at their pleasure, or as their needs may require. The State imposes the duty to lay out all necessary highways, and to maintain them in a reasonably safe condition, on towns and such other municipalities as have the care of highways. And, to enforce the performance of this duty, a statutory liability rests upon the town or municipality.

This duty and liability rested on the city of New Britain, in respect to Church street, both by its charter and by the public law. Every time a street is excavated to lay therein a sewer, a gas pipe, or a water main, or any other underground pipe or conduit, for the time being that part of the street is made unsafe for public travel. Every time these pipes or conduits need to be repaired, and every time a householder on the street desires to make a connection with any one of these pipes, the street must be dug up; and for a limited time the street is made unsafe. If, in respect to any of these excavations, the municipal authorities should be negligent in respect to guarding them or warning travelers of their existence, the municipality may be compelled to pay damages to any one injured thereby. Of course, the greater number of these underground pipes or wires there are, the greater is the burden of the municipality, and the greater the vigilance which the authorities must exercise. The city of New Britain is, in respect to its highways, like every other town in the State. It rests under an obligation to keep all its highways in reasonable repair. All the towns are compelled to act in this behalf without compensation or pecuniary profit. The sole motive is the public good. So long as the legislature leaves this duty and liability in respect to highways resting upon towns, as it now does, it is not to be supposed that any right will be given to the relator, or other like corporation, to do anything in a highway whereby the burden of that duty and liability will be increased, except that such right is exercised under the control and regulation of those officers in the town or city who are charged with the duty of taking care of the highways. So long as this liability remains, the authority of the town in respect to its highways must be deemed to be superior to any other. We think the amendment of the relator's charter should be construed in the light of the considerations we have mentioned. So construed, it does not take away from the town authorities their superior right of control over the highways. So construed, it does not give to the relator, in respect to highways, the power which it claims.

The return sets forth that there are in the streets of New Britain, other than the wires of the relator, overhead wires for telephonic, telegraphic, fire alarm, and electric lighting purposes; that said city desires, so far as is practicable, to get underground all the overhead wires now in use in said city, but it desires to attain that end by a plan whereby there shall be as few conduits and ducts as possible, and whereby public travel upon the streets and highways, and the sewers and gas and water pipes under the surface of said streets, shall be the least interfered with; that the common council of the said city, through its proper committee, signified to the relator its willingness to consider and adopt, under reasonable regulations, plans relating to said underground wires of the relator, and the laying of conduits and ducts for the passage of such wires. It further sets forth that the common council of the city has had, and still has, under consideration the matter of underground wires in said city, and is, by a proper committee, investigating the plan and methods in use in other cities, and intends, within a reasonable time, which has not yet expired, to make, by a proper ordinance, reasonable regulations for putting underground as many as possible of the overhead wires now in use in said city, in such manner as to interfere as little as possible with the use of the streets for public travel. All these things are admitted by the relator, by its demurrer, to be true. It seems to us that, in doing the things so set forth, the common council is acting clearly within its authority, and that there is nothing in the amendment of the charter of the relator by which it can be required to do otherwise. We think the return shows a clear right to the defendant to refuse obedience to the alternative writ. And we think it shows an equally clear right to refuse, if the alternative writ had been addressed to the city or to its common council, instead of to the present defendant. There is no error. The other judges concurred.

NOTE.—See note to *Commonwealth v. Warwick*, post; also note at end of Part I.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY AND
POTOMAC TELEPHONE COMPANY OF BALTIMORE CITY v. THE
MAYOR AND CITY COUNCIL OF BALTIMORE ET AL.

Maryland Court of Appeals, June 22, 1899.

(89 Md. 689.)

TELEPHONE WIRES IN CONDUITS.—ORDINANCE CONTRACT, NOT LICENSE.

A municipal ordinance, enacted with legislative authority, permitted the two telephone companies, plaintiff, to construct and use conduits for their wires, provided they should comply with certain conditions. Two subsequent statutes, with reference to the construction and use of conduits, expressly recognized and excepted from their operation the said ordinance and the rights and privileges thereby granted.

Held, that the ordinance was a contract and not a license, and could not be repealed or modified to the prejudice of the plaintiffs, who had complied with all its conditions, there being no public necessity for such repeal or modification in the proper exercise of the police power of the municipality.

Injunction is a proper remedy to prevent the enforcement of an invalid ordinance. "Telegraph" in a statute includes telephone.

Appeal from decree of Circuit Court of Baltimore city, refusing injunction.

A. W. Machen and Bernard Carter, for appellants.

John V. L. Findlay, for appellees.

PEARCE, J., delivered the opinion of the court: The appellants, being the plaintiffs below, filed a bill in the Circuit Court of Baltimore city for the purpose of enjoining the city authorities from preventing, obstructing, or in any way interfering with the construction by the plaintiffs, under the supervision of the city commissioner, of underground conduits upon certain streets named in the bill, according to the plans of location and construction filed with the bill, or with the making of the neces-

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sary excavations for such conduits, or with the use thereof for the laying and using of telephone wires therein. The material facts of the case may be condensed as follows: The Chesapeake & Potomac Telephone Company is a corporation of the State of New York, authorized to construct and operate telegraph lines partly in and partly out of the State of New York, including all the cities, towns, and villages of Maryland, and has ever since its incorporation, in 1883, exercised its franchises both in the State of New York and in Baltimore city. The Chesapeake & Potomac Telephone Company of Baltimore City was incorporated under the laws of Maryland in March, 1884, its stock being owned by the Chesapeake & Potomac Telephone Company. It is authorized to construct telegraph lines upon any roads, highways, or streets within the State, by erecting the necessary poles and fixtures, and to acquire the property of any telegraph companies then or thereafter existing; and it did thus acquire various telegraph lines. By the decisions of this court, telephone lines are included within the term "telegraph lines;" and by chapter 161, Laws 1886, now section 254, art. 23, of the Code of Public General Laws, all corporations formed as the Chesapeake & Potomac Telephone Company of Baltimore City was formed, and then in practical operation in Baltimore city, were authorized to lay any part of their lines underground on any route where they were authorized to construct such lines above ground; but all corporations not in practical operation at the adoption of the Code of 1888 were obliged to obtain a special grant for this purpose from the State, and the assent and approval of the mayor and city counsel, before using either the surface or the subsurface of the streets. Prior to 1889 there were no underground conduits in Baltimore city for the use of telegraph or telephone lines, but during that year the plaintiffs established a telephone exchange in a new building upon the corner of St. Paul street and Bank Land, a thickly-settled business location in the central portion of the city; and on May 9th, 1889, the mayor and city council enacted Ordinance No. 41,

entitled "An ordinance to provide for laying the wires of the Chesapeake and Potomac Telephone Company of Baltimore City, or the Chesapeake and Potomac Telephone Company, or both of said companies, in underground conduits in the city of Baltimore." The preamble of this ordinance sets forth that, if the overhead system of wires is wholly continued, the number of such wires along the street leading to the exchange must be largely increased, that such increase and concentration at so central a point are not desirable, and that the public convenience requires that such wires, so far as practicable, should be laid in cables underground. It then proceeds to enact and ordain that the said two telephone companies, acting separately or in conjunction, be authorized "to lay their wires to be used in connection with said exchange" in suitable conduits, "under the surface of the streets, alleys, or highways, in said city now traversed, or to be so traversed by their respective wires," provided said conduits be so constructed as not to injury any vault, sewer, water, or gas pipe; and provided, further, that "the grant" above mentioned, should not be deemed an exclusive grant, and that the same should cease and determine unless three miles of such conduits should be constructed within two years from May 9th, 1889, and that after said two years, and as rapidly as said wires should be laid in said conduits, all poles of said companies along all streets upon which their conduits were so laid should be removed, and should not be replaced, except when necessary to make connections with the buildings to be served by such conduits and wires. It further ordained that said telephone companies, "in consideration of the rights and privileges granted to them by this ordinance," before constructing any portion of said conduits should comply with the following requirements: (1) To execute an agreement, in form and with security to be approved by the mayor and city council, to pay to the city, annually, 30 cents for each lineal yard of the first four miles of conduits so constructed, and 20 cents per lineal yard for all over four miles: provided, no annual payment

should be less than \$3,000; also before constructing any portion of such conduits, to file with the city commissioner a plan showing the location and character of all conduits next proposed to be constructed, which construction should always be under the supervision of the city commissioner, and to replace all paving removed in said construction, to the satisfaction of said commissioner. (2) To provide, in every conduit so constructed, space, free of cost or rent, for the laying therein by the fire commissioners of the city of a cable for the exclusive and official use of the police and fire alarm telegraph, and the police and patrol wires. (3) Before exercising any privileges under said ordinance, to execute a bond in the sum of \$10,000, with approved security, conditioned for the faithful performance of all requirements of said ordinance on the part of the said companies.

The bill avers that the plaintiffs accepted the provisions of this ordinance, and that much more than three miles of conduits were constructed within two years from its approval. It sets forth in detail compliance by the plaintiff with each and every requirement of the ordinance, and charges that said ordinance, so enacted and so accepted, constitutes a contract reasonable in its terms, which the city was competent to make, and which is binding on both parties thereto. In 1892 the legislature of Maryland, by chapter 200 of the acts of that session, authorized the mayor and city council of Baltimore to provide a series of conduits under the streets, lanes, and alleys of said city, either by constructing the same, or by authorizing their construction by any person or corporation, but expressly provided therein "that nothing herein contained shall be deemed or taken to modify or change in any manner the provisions of ordinance number forty-one (41), or the rights and privileges granted thereby." In 1898 the legislature, by chapter 123 of the acts of that session, enacted the new charter of Baltimore city, being a repeal and re-enactment, with amendments, of article 4 of the Code of Public Local Laws. In section 6 of

article 4, as thus amended, under the subhead "Streets, Bridges, and Highways," the general powers of the mayor and city council in relation thereto are enumerated and prescribed. Among these is the power to regulate the use of streets, highways, and roads, and to prevent encroachment thereon or obstruction of the same, and to regulate the opening of street surface for the purposes authorized by law or ordinance; to regulate the use of streets, lanes, or alleys by telegraph, telephone, or other wires, in, under, over, or upon the same, and to require all such wires to be placed underground after such reasonable notice as it may prescribe; and to provide for a series of conduits,—using in this last connection the exact language of the act of 1892, and then adding, also in the exact language of that act, except that the word "article" is also substituted for the word "act," that "nothing herein contained shall be deemed or taken to modify or change in any manner the provisions of ordinance number forty-one (41)." The bill then avers that, in reliance upon the rights and privileges secured by ordinance No. 41, the plaintiffs constructed during 1889 and 1890, in the streets of Baltimore, more than eleven miles of underground conduits, in all of which space was provided, free of cost or rent, for the laying of a wire for the exclusive use of the city, and in most of which such wire was laid, and has been used by the city from the construction of the conduits down to the present time; that in the year 1898 the plaintiffs found it necessary for the accommodation of their increasing business to construct additional underground conduits in the northern and western part of the city, in accordance with plans submitted to the city commissioner, and they obtained a permit therefor on August 8, 1898, in pursuance of which, and under the supervision of the city commissioner, they proceeded with the construction of said conduits, and the laying of cables therein, until the middle of November, 1898, and that said last mentioned cables and conduits, constructed at a cost of over \$29,000, are now used in connection with said exchange; and that in all of them provision is made

for a wire for the exclusive use of the city of Baltimore. The bill further avers that, while under ordinance No. 41 no permit is required for the construction of said conduits, yet by ordinance No. 2 of 1892 it is provided that no person or corporation shall, for any cause whatever, dig up or uncover any of the streets, lanes, or alleys of the city without a written permit therefor from the city commissioner, approved by the mayor, and that the plaintiffs, being willing to comply with the regulation, and having need to construct underground conduits upon Robert, Madison, and other streets, on the 24th of April, 1899, applied in writing for a permit, filing at the same time plans of the location and character of such proposed conduits, as required by the ordinances, but that on April 28th, 1899, the city commissioner refused to issue the permits applied for, or either of them, without assigning any reason for such refusal; and plaintiffs then charge that the true reason therefor was the passage by the mayor and city council on April 18th, 1899, of an ordinance (a copy of which was filed with the bill) purporting to repeal ordinance No. 41, and providing that such repeal shall not interfere with the use and control of conduits constructed under ordinance No. 41 before January 1, 1898: provided, such conduits do not interfere with the future use of the streets upon which the same are constructed. The bill further charges that, the permit applied for having been wrongfully refused, the plaintiffs are entitled to proceed without such permit, and are desirous to do so, but they aver that they have good reason to believe, and that they do believe, that the mayor intends to use his official authority, and his influence with the police directed by the marshal thereof, to prevent by force the construction of such conduits, and they therefore pray for an injunction against the mayor and city council of Baltimore, William T. Malster, mayor of the city of Baltimore, and Samuel T. Hamilton, marshal of the police of said city, enjoining them and their agents from interfering in any manner with the construction of said conduits upon the streets named in the prayer of the bill. The

bill, with exhibits sustaining its allegations, was filed May 1, 1899, and was immediately laid before the court (Judge WICKES), who on the same day, "upon consideration of the foregoing bill of complaint," passed a decree refusing the injunction, from which decree this appeal is brought.

The defendant has moved to dismiss the appeal upon the ground that it appears upon the face of the record that its object is to obtain from this court a preliminary ruling on an *ex parte* statement of a question involving public interests of great magnitude, without notice to defendant or those to whom is confided the duty of protecting these interests. But this motion cannot prevail. Section 29 of article 5 of the Code of Public General Laws provides that, whenever any court having equity jurisdiction shall refuse to grant an injunction according to the prayer of the bill, an appeal may be taken from such refusal. This section had its origin in the act of 1832, c. 197, which authorized an application to the judges of the Court of Appeals, or one of them, when an injunction should have been refused by the County Court. Under that act only the bill and the exhibits were submitted to the judge of the Court of Appeals, and the original papers were forthwith transmitted by the clerk. In *Steigerwald v. Winans*, 17 Md. 62, the court held that a complainant has the right to demand a decision on his bill, and, if the injunction be refused, to appeal directly to this court, but if he elects to postpone his appeal till proof is taken, and the cause decided on it, his right of appeal under this section is gone. In *Bell v. Purvis*, 15 Md. 22, it had been previously decided that where an answer comes in before injunction ordered, and so denies the equity of the bill as to authorize dissolution of the injunction on motion to dissolve, the injunction ought not to be granted; and the same was also held in *Barnum v. Gordon*, 28 Md. 97. In that case the court said that the judge to whom an application for an injunction is made may with perfect propriety take time for consideration, and give notice to the parties to be affected by the injunction, and afford them an opportunity

to be heard, in any case in which he may believe the purposes of justice may be thereby subserved. But it is obvious that this is a matter necessarily within the discretion of the court, and this discretion must in the present case, as in all others, be deemed to be exercised with as much wisdom and propriety in forbearing to give as in giving such notice. The case last mentioned was decided in 1867, and evidently in consequence of these decisions chapter 102 of 1868 was enacted, which added to section 29 of article 5 the provision that the right of appeal thus given shall not be prejudiced by the filing of an answer, nor by the taking of depositions with reference to the allegations of the bill, and that the bill shall be heard on a transcript of the bill or petition, with such other papers in the cause as may be necessary, so soon as conveniently may be after such transcript shall have been filed in the Court of Appeals. The act of 1868 therefore changed the rule previously declared. In *O'Brien v. Balt. Belt R. R. Co.*, 74 Md. 363, the answer was filed before injunction ordered, and, being in, was entitled to be considered, but could not, *per se*, defeat the right of appeal. In *Bonaparte v. Balt., Hampden and Lake Roland Co.*, 75 Md. 340, Mr. Bonaparte sought an injunction to restrain defendant from constructing its railroad across an avenue by which he had access to his premises; alleging that defendant's charter was void, and work thereunder was being prosecuted without lawful authority. When the bill was filed, and a preliminary injunction was asked for, instead of granting the injunction at once and outright, the judge set a day for hearing, and, until that hearing could be had, passed a restraining order. The defendant contended that this restraining order was a preliminary injunction, and that the order passed after hearing was the dissolution of the injunction already granted, and it therefore moved to dismiss the appeal; but the court said it was evident the judge below desired to know whether a case was made for preliminary injunction, and therefore ordered a hearing on the application made by the bill, and the motion to dismiss was

accordingly overruled. The inference from this is too plain for controversy,—that the judge might, had he seen fit, have granted the injunction without hearing, and that in such case there would have been a right of appeal. We therefore think the plaintiffs, in the course pursued, were in the exercise of their legal right to present the question raised by the appeal and the motion to dismiss will therefore be overruled.

It is contended on the part of the defendant that ordinance No. 41 has none of the elements of a contract, but that it is simply a license, revocable whenever the public interests require its revocation,—saving, of course, any rights which plaintiffs have acquired up to the time of revocation, as attempted by the repealing ordinance,—while on the part of the plaintiffs it is contended that the passage of ordinance No. 41 was a proposition to the plaintiffs to enter into a contract securing to them valuable rights and privileges upon valuable considerations moving from them, and that upon acceptance by plaintiffs of the provisions of said ordinance, and compliance by them with all its stipulations, a valid contract was made and concluded, and that, after the construction thereunder of three miles of conduits within two years, the contract, by its terms, became irrevocable, and the repealing ordinance is for this reason inoperative and void. The defendant relies largely, in support of its contention, upon the decision in the *Lake Roland Elevated Ry. Case*, 77 Md. 352. In that case an elaborate and learned opinion was delivered by Judge BRYAN, holding that the ordinance of the mayor and city council of Baltimore authorizing the railroad to lay down double tracks on certain streets in the city was not irrevocable, and that a subsequent ordinance repealing that part of the previous ordinance which authorized double tracks on Lexington street, but permitting a single track upon certain conditions, was a valid exercise of power by the mayor and city council; but we have not been able to discover any expression of opinion or any intimation therein, or in the opinion delivered by Judge ALVAY in overruling a motion for reargument, that

the grant was regarded merely as a license, as was argued by defendant's counsel in his brief in this case. The proof was that, if double tracks were permitted on Lexington street, their existence would be incompatible with the use of that part of the street by vehicles of any description, and that the sidewalks alone would be available for use by the general public. Judge BRYAN said it was the duty of the city authorities to preserve the streets for their primary legitimate purposes, and that it was not competent for them, by such a grant, to defeat these purposes. The whole opinion went upon the ground that such contracts are made upon the implied condition, understood and accepted by the grantee, that if the safety, health, or morals of the public shall require the rescission or modification of such contract, it may be rescinded or modified, under the police power of the State or of the city, where the city has been vested by the State with such power. In illustration of the application of this rule of law, we may cite the case of *N. Y. & N. E. R. R. Co. v. Bristol*, 151 U. S. 556, in which the removal of a grade crossing constructed under the charter was ordered, and an overhead crossing was required at the cost of the railroad. The action of the legislature was sustained, the court saying that the inhibitions of the constitution of the United States upon the impairment of the obligation of contracts are not violated by the legitimate exercise of legislative power in securing the public safety, health or morals. And in the later case of *C. B. & Q. R. Co. v. Omaha*, 170 U. S. 57, where the State undertook to alter the terms of a contract under which a viaduct had been built at the joint expense of the city and the railroad, it was said that, where the subject matter of the contract is one which affects the safety and welfare of the public, it is held to be within the supervising power of the legislature, when exercised to protect the public safety, health or morals, and that clause of the Federal constitution which protects contracts from legislative action cannot in every case be successfully invoked. "The presumption is that, when such contracts are entered into, it is with the

knowledge that parties cannot, by making agreements on subjects involving the rights of the public, withdraw such subjects from the power of the legislature." It was upon the same principle that this court proceeded in *Rittenhouse v. The Mayor and City Council*, 25 Md. 336, in sustaining repeal of an ordinance providing for the erection of an almshouse, and in annulling a contract with Rittenhouse for its erection, but providing for an equitable settlement for work done under the contract. The site of the building having been found to be unhealthy, due regard for the safety of the inmates and for the public welfare required that the site should be abandoned, and work upon the building discontinued. We cannot agree with the counsel for defendant that Judge ALVEY, in his opinion on the motion for reargument in the Lake Roland case, treated the grant of the privilege of the streets to the railroad as a license. We think he dealt with it as a contract liable to rescission or alteration only by reason of the duty of the city to keep the streets safe for their ordinary uses, and that his reference to compensation "in accordance with a well-established principle in the case of the revocation of an executed license" was but a legal analogy altogether appropriate for the illustration of his argument.

We think the result of ordinance No. 41, and of its acceptance by the plaintiffs, was the creation of a valid contract, and that there is no evidence or suggestion in the record of any danger to the public health, safety, or convenience which would warrant its rescission by the mayor and city council in whole or in part. On the contrary, the recitals of that ordinance show that both the public safety and the public convenience were controlling considerations with the mayor and city council in its enactment, and in the body of the ordinance the public interests were sedulously guarded by the following provisions: (1) That the right to lay underground conduits should not be deemed an exclusive grant, so as to create a monopoly; (2) that the rights granted should be forfeited unless a permanent underground system was assured by the construction of at least three miles of

conduits within two years thereafter; (3) that all poles or lines where conduits were laid should forthwith be removed, except when required for house connection; (4) that an annual charge of from 30 to 20 cents for every lineal yard of conduit laid should be paid to the city; (5) that, in each conduit laid, space should be provided, free of cost or rent, for a wire for the exclusive use of the city authorities; and (6) that an adequate bond should be given for the faithful performance of all these requirements. Chapter 200 of the acts of 1892 and the new charter (chapter 123) of 1898 both afford evidence that there has been no change in the views entertained by the public, as represented by the charter commission and the legislatures of 1892 and 1898, as compared with the views of the mayor and city council by whom ordinance No. 41 was enacted, since both acts of the legislature give authority to the city to provide a series of conduits throughout the streets and alleys, by construing or authorizing the construction of the same by any person or corporation, and to require all telegraph and telephone wires to be placed in such conduits. No public interest embraced within the police power could be served by repealing ordinance No. 41, and thus compelling the plaintiffs either to resort again, so far as relates to all these conduits laid since January 1, 1898, and to all future extensions of their wires, either to the inferior pole service, which may at any time be prohibited by the city, or to put all such wires in the conduits to be constructed or authorized by the city, and upon new and other terms than those prescribed in ordinance No. 41. The city might, it is true, thus secure a much larger annual payment from the plaintiffs—one, perhaps, more fairly proportioned to the value of the franchise granted by the ordinance. But this wish or motive will not justify the repeal proposed. In *City Water Co. v. Bridgeport Hydraulic Co.*, 55 Conn. 1, the consideration was pressed upon the court that a decision in behalf of defendant would be the protection of a monopoly, and that a monopoly is odious. In rendering its decision for defendant, the court said: "This argument forgets

the fact that it is the judicial duty to preserve contracts inviolate, rather than to destroy monopolies. Communities may endure monopolies, but cannot endure the violation of contracts."

But, apart from the fact that the attempted repeal of ordinance No. 41 cannot be brought within the exercise of the police power, so as to justify the repeal upon that ground, there is another and a conclusive reason why it is beyond the power of the mayor and city council in any mode to effect its repeal or impair its operation. By chapter 200 of the Acts of 1892 the legislature of Maryland, after three years' trial of the policy inaugurated by the mayor and city council upon their own authority, in the contract with the plaintiffs, authorized the mayor and city council either to construct, or to authorize any person or corporation to construct, conduits throughout the city for the use of telegraph, telephone and electric light wires, to require all such wires to be placed in said conduits, and to prescribe reasonable rentals for the use thereof; thus establishing a general and uniform policy under the sanction of the State, similar to the special policy inaugurated under the sanction of the mayor and city council with the plaintiffs. But to this general grant of authority there was annexed a proviso "that nothing contained in this act shall be deemed or taken to modify or change in any manner the provisions of ordinance No. 41 approved May 8th, 1889, or the rights and privileges thereby granted." Whether the mayor and city council had the power to grant these rights and privileges at the time that contract was made, it is not necessary to inquire, because chapter 200 of the Acts of 1892 must be taken as a legislative ratification and confirmation of that contract, with all its rights and privileges. Cooley, in his work on Constitutional Limitations (6th Ed., 486), speaking of contracts by municipal corporations, which, when made, were in excess of their authority, but subsequently have been confirmed by legislative action, says: "If the contract is one which the legislature might originally have authorized, the right of the legislature to confirm it must be recognized. In *Balt. & Potomac R. R. Co.*

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v. Reany, 42 Md. 117, the act of 1870, chapter 80, while containing no express terms of ratification of the ordinance under which a tunnel had been built by the railroad, used in one section "terms equivalent to terms of express ratification," and Judge ALVEY said: "The authority given by the city to make the tunnel is recognized, and there is power given to charge additional profits and tolls for its own use. This is a clear ratification or grant of authority, at least by implication, and it is settled that such authority may be granted by implication. *Inhabitants of Springfield v. Conn. R. R. Co.*, 4 Cush. 63." See, also, *O'Brian v. Co. Com.*, 51 Md. 24, to same effect. In *Pompton v. Cooper Union*, 101 U. S. 202, the question was whether certain bonds of the town of Pompton were issued with proper legal authority. Subsequent to their issue the legislature abolished the commissioners of Pompton township, and devolved upon a township committee certain duties of the commissioners, including the providing of necessary funds and the payment of interest on these bonds. It was held that this act was a recognition of Pompton as one of certain towns authorized to issue such bonds, and the court said: "In cases like this, legislative ratification is the equivalent of original authority, and what is clearly implied in a statute is as effectual as what is expressed." Upon the principle last above stated, the act of 1892 not only operates as a ratification of ordinance No. 41 as of the date of its approval, and of all that had been done thereunder, but it also operates, from its own date of approval, as a legislative grant for the future of the rights and privileges thus ratified, and as a legislative prohibition against any interference by the city therewith. The body of that act authorized the city to require all companies using any kind of electric wires to place them in the conduits constructed or authorized by the city; but the proviso excepted out of this grant of power the plaintiffs' companies, and in express language declared that their rights and privileges should not be modified or changed in any manner, and the exception was thus not only a grant of power thereafter to enjoy, under the protection of the

State, the rights and privileges they had theretofore enjoyed under the protection of the city, but it was also the equivalent of an express denial of power to the city to compel them at any future time to surrender these privileges, in virtue of the general powers conferred upon the city to deal with electric companies in this regard. The new charter, approved March 24, 1898, contained the same proviso as the act of 1892, and all we have said as to the legal effect of that act is applicable to the new charter, without repetition. Inasmuch as the new charter repealed the whole of article 4 of the Public Local Laws of the State relating to the city of Baltimore, and embracing the act of 1892, it was necessary to incorporate into the charter the proviso of that act, in order to give to the plaintiffs the continued assurance that their rights and privileges were beyond the control of the mayor and city council, and to remove all doubt upon that subject from the minds of all persons interested in, or dealing with, said companies. We hold, therefore, that from the moment the plaintiffs were, by the proviso of the act of 1892, taken under the protectingegis of a legislative grant, the mayor and city council were powerless to destroy, change, or modify their existing rights and privileges, and the ordinance of April 18, 1899, is wholly ineffectual. The possible unfavorable effect of such a decision upon other corporations using electric wires, or upon the revenues of the city, however much deprecated by others, are considerations which we are not at liberty to entertain; and we may here repeat the language of this court in the *Lake Roland Elevated Ry. Co.'s Case*, 77 Md. 382: "We say once more for all that we are dealing only with the case before us. Franchises and privileges granted by the legislature cannot be annulled by an ordinance of the mayor and city council." Whether it is competent for the State to repeal that part of the new charter which confirms the rights and privileges conferred upon the plaintiffs by ordinance No. 41 is a question which does not arise in this appeal. The State has not attempted such repeal, and until it does so it would be premature and unauthorized to pass upon its right and power to do so.

The remaining question is as to the jurisdiction of the court to interfere by injunction in this case. The rule is thus stated in 2 Beach, Inj., sec. 1279: "Equity will interfere to protect and secure the enjoyment of a franchise secured by statute, because it affords the only plain and adequate remedy. So it will protect rights of a like character acquired under a lawful municipal ordinance." This rule is supported by numerous cases both in the State and Federal courts, among which are *City of Quincy v. Bull*, 106 Ill. 337; *Springfield R. Co. v. Springfield*, 85 Mo. 676; *Easton R. Co. v. Easton*, 133 Pa. St. 505; *Osborn v. Bank of United States*, 9 Wheat. 842; and *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, where the court said: "It has been repeatedly decided, in affirmance of the general proposition, that the remedy at law, in order to exclude a concurrent remedy at equity, must be as complete, as practical, and as efficient to the ends of justice and its prompt administration, as the remedy in equity." In *Holland v. Mayor, etc.*, 11 Md. 197, it was held that a municipal corporation will be restrained by injunction when attempting to enforce an invalid ordinance; and that case was confirmed in *Page v. Mayor, etc.*, 34 Md. 567. In *Hooper v. City Passenger R. R. Co.*, 85 Md. 509, it was held that the company was entitled, under its legislative grant, to use electricity upon any of its lines, and that this right could not be destroyed by the refusal of the mayor to issue a permit for the erection of the poles; and the injunction which had been granted by the court below restraining the city authorities from interfering with the erection of poles, was sustained by this court. That case is not distinguishable in any material point from the case before us, and in view of that decision the majority of the court is of opinion that the proper remedy is by injunction. The writer of this opinion regards mandamus as the proper remedy, and a memorandum will be filed, briefly stating the ground of this view. We think, however, that, in a matter of so much moment to the parties, the purposes of justice will be advanced by permitting further proceedings in the cause, and that an oppor-

tunity should be given the defendants to answer, and for a hearing upon the merits; and the cause will therefore be remanded, under article 5, § 36, of the Code, without affirming or reversing the decree of the Circuit Court for Baltimore city. Cause remanded, without affirming or reversing the decree, for further proceedings in conformity with this opinion; costs above and below to abide the final result of the cause.

PEARCE, J., also delivered a separate opinion.

NOTE.—See note to second following case; also note to *Commonwealth v. Warwick*, post; also note 2 at end of Part I.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF BALTIMORE CITY V. THE MAYOR AND CITY COUNCIL OF BALTIMORE ET AL.

Maryland Court of Appeals, February 14, 1900.

(90 Md. 638.)

UNDERGROUND TELEPHONE WIRES.—INJUNCTION.

Where a telephone company, acting in accordance with the terms of a city ordinance, the acceptance of which by the company has been declared by the courts to constitute a valid contract and which contract has been ratified and perpetuated by the legislature, proceeds to file with the city commissioner plans for the construction of conduits for its wires and to express its willingness to construct them under the supervision of said commissioner, a new ordinance adopted by the city does not operate to repeal the former one and the city will be restrained from interference with the construction of the conduits during such time as the work is properly done under the direction of the city commissioner and in accordance with reasonable regulations adopted by him.

APPEAL by plaintiff from order of Circuit Court of Baltimore city, refusing injunction.

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Arthur W. Machen and Bernard Carter (with whom was *Wm. S. Bryan, Jr.*, on the brief), for appellant.

John V. L. Findley, John E. Semmes and Leon E. Greenbaum, for appellees.

BRISCOE, J., delivered the opinion of the court. The bill in this case was filed for an injunction to restrain the appellees, the mayor and city council of Baltimore and its officers, from preventing, obstructing, or in any way interfering with the construction, under the supervision of the city commissioners of Baltimore, of underground conduits upon parts of certain designated streets in that city, according to plans of location and construction submitted by the appellants, or for making the necessary excavations for the conduits, or from interfering with their use for the laying and using of telephone wires therein. The injunction prayed for was on the 1st of May, 1899, denied by the Circuit Court of Baltimore city, and on the same day an appeal was directed to this court. The case was heard on bill and exhibits, and our decision of the case upon the record then before us will be found reported in 89 Md. 689. In the opinion then filed we carefully considered and passed upon the questions of law presented in the case, but stated that in a matter of so much moment to the parties the purposes of justice would be advanced by permitting further proceedings in the cause, and that an opportunity should be given the defendants to answer, and for a hearing upon the merits. The case was then remanded, under article 5, § 36, of the Code, without affirming or reversing the decree of the court below. The case is now before us upon bill, answer, and proof, and the second appeal is from a *pro forma* order, refusing the injunction as prayed for.

The appellees contend that the appellants are not entitled to relief for the following reasons: First, because of the inequitable and illegal acts of the appellants; second, because an injunction is not the proper remedy; third, because the ordinance which is the foundation of their rights is not an irrepealable con-

tract; fourth, because the said ordinance was subject to repeal, in the exercise of the police power, and was repealed in the exercise of this power; fifth, because there has been no legislation of the general assembly of Maryland which has converted the said ordinance into an act of assembly. Now, we do not think that any useful purpose will be served by repeating and elaborating the reasons which controlled us in the decision of the questions of law raised on the former appeal. We entertain no doubt as to their correctness, and will briefly state them: First, that injunction is a proper remedy to enforce the rights of the appellant companies; second, that the result of ordinance No. 41, and of its acceptance by the company, was the creation of a valid contract; thirdly, that Act 1892, c. 200, and Act 1898, c. 123 (the new charter), are legislative ratification and confirmation of that contract, and they not only operate as a ratification of ordinance No. 41 as of the date of their approval, and of all that had then been done thereunder, but they also operate from their date of approval as a legislative grant for the future of the rights and privileges thus ratified, and as a legislative prohibition against any interference by the city therewith; fourthly, that the mayor and city council could not destroy, change, or modify the plaintiff's rights and privileges granted by Act 1892, c. 200, and Act 1898, c. 123, and that the ordinance of April, 1899, did not work a repeal of the rights acquired and granted by ordinance No. 41; and, fifthly, that whether it is competent for the State to repeal the legislation which confirms the rights granted by ordinance No. 41 is a question which does not arise on this appeal. We deem it right and proper, however, to state that it is in no sense the duty of this court to question the wisdom or policy of the legislation which is attacked by the appellees in this case. If constitutional, it is our plain duty to sustain it. If, on the other hand, it is invalid, it would have been so declared on the former appeal. We are not, however, to be understood as intimating that the ordinance and statutes heretofore referred to are beyond legislative control.

The questions of law, then, having been settled by us in the former case, we come to a consideration of the facts as the case now stands. We have carefully read and considered the evidence contained in the voluminous record before us, and fail to find sufficient evidence, under the pleadings in the cause, to sustain the contention of the appellees. It will be seen that a large part of this testimony has no relation to the conduit constructions in question, or to the questions at issue in this case. The questions here involved, as appears from the allegations of the bill, relate solely to the construction of certain underground conduits to be laid by the appellants under the supervision of the city commissioner of Baltimore upon parts of the following-named streets: Upon Robert street, Pennsylvania avenue, Laurens street, Fremont avenue, and Winchester street, and also upon parts of Madison avenue, Presstman street, Morris alley, Druid Hill avenue, and North avenue, according to plans of location and construction submitted by the appellants to the city commissioner. It is not claimed nor contended upon the part of the appellants that any other streets of the city are involved in this controversy, so it is with the use of these streets in the proposed conduit construction by the appellant companies, and with these streets only, we are concerned and have to deal. The controlling question, then, comes to this: Have the appellants complied with the terms and provisions of ordinance No. 41, as to the proposed conduit constructions in the streets now in controversy, as entitles them to the equitable relief by injunction against the city authorities? The object and purpose of the ordinance, as declared by its title, is to provide for laying the wires of the appellant companies in underground conduits in the city of Baltimore. It provides that such conduits and manholes shall be constructed in such manner as not to injure any vault, sewer, water pipe, or gas pipe, and such conduits and manholes shall be constructed by either or both of said companies, as parts of one system, at their or their respective cost and expense. And after directing certain things to be done before constructing any

conduits, it specially provides that they shall file with the city commissioner a plan showing the location and character of the portion or portions of the conduit or conduits next proposed to be constructed, and every such conduit or part thereof shall be constructed under the supervision of the city commissioner, and all paving which may be temporarily removed by the companies or company hereinbefore mentioned in the course of the construction of any conduit or conduits so authorized shall be restored or replaced, under the direction and superintendence of the city commissioner, by the companies or company constructing said conduit or conduits, and at their or its expense, in a manner satisfactory to said commissioner. In pursuance of the provisions of this ordinance, the appellants, on the 1st of May, 1899, filed two applications for permits to construct conduits in the streets mentioned therein, according to certain plans accompanying those applications; and to these plans showing the character of the conduits there is annexed the following statement: "Plan, dimensions, and situation of conduits to be shown above, except where conditions may necessitate modifications sanctioned by the city commissioner." We quote from a portion of one of these applications addressed to the city commissioner of Baltimore by the president of the appellant companies: "I herewith deliver to you a plan marked 'G. S. C. No. 165,' showing the location of said conduits on the streets, and the respective sides thereof, subject to such change in the location of the conduits in the said streets as may be required or approved by the city commissioner, the position of said conduits in relation to the curb line of said streets respectively to be such as shall be approved of by the city commissioner." "I also deliver to you a plan marked 'G. S. C. No. 166,' showing the character, dimensions and situations of said conduits. All of these wires to be laid in said conduits will be used in connection with telephone exchange belonging to the companies in the telephone building at the corner of St. Paul street and Bank lane in the city of Baltimore, space being reserved in said conduits for the laying

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therein by the fire commissioners of the city of Baltimore of a cable for the use of the police and fire alarm telegraph and police and patrol wires. All of the work under this application will be done under the supervision of the city commissioner, and subject to his approval. I respectfully ask that a permit be issued by you, etc. These applications were refused by the city commissioner for the reasons stated in the following letter: "Referring to your communication of the 22d inst. forwarding two (2) applications of your company for laying certain conduits in the city of Baltimore, said applications bearing date April 22d, 1899, and being accompanied by plans marked 'G. S. C., Nos. 163, 164, 165 and 166,' under instructions from the city solicitor, the only answer that I can give to your request for said granting of permits is that I must decline to issue the said permits applied for in said application." It appears, then, from the foregoing recitals from the plans and specifications filed by the appellant companies, that not only the location and character of the proposed conduits were submitted and left to the determination of the city commissioner, but the execution and construction of the whole work was to be done under his supervision, according to the positive terms of the ordinance. And it is conceded in the brief of the appellants "that the right and duty to exercise this supervision involves the right and duty to forbid any mode of construction which, in his judgment, would be an unreasonable exercise of the right granted by ordinance No. 41." Nor is the right and duty of the mayor and city council of Baltimore to adopt reasonable regulations for the proper protection of its interests, consistent with the protection and exercise of the rights and privileges of the appellant companies under the ordinance, in any manner denied or questioned by the appellants. This right of reasonable regulations is fully sustained by the Supreme Court of the United States in the following cases: *Baltimore v. Baltimore Trust Co.*, 166 U. S. 673; *Laclede Gas Co. v. Murphy*, 170 U. S. 78. The city commissioner is thus made by the ordinance the representative of the city as to the

examination of the plans, which can be modified by him as the necessities of the case arise, and also as to the supervision, execution and construction of the work. His reasonable instructions and directions as to the whole work must be obeyed and carried out by the appellant companies. The location and character of the conduits, and their position in relation to the curb line of the streets, are to be approved by him, including the location, dimensions, and method of construction of the manholes. In other words, the broadest powers are given the city commissioner to protect the rights and interest of the city in the whole work of conduit construction and the location and character of the manholes. It is to be done under his direction and supervision, as ordained by the ordinance. Our conclusion, then, is, without appellant companies have filed with the city commissioner plans setting forth the location and character of the conduits proposed to be constructed by them, as required by ordinance No. 41, and as it is alleged that they are willing to construct them in the streets named under the supervision of the city commissioner, they are entitled, under the pleadings and evidence in this case, to the injunction against city interference, according to the prayer of their bill. The bill, however, will be retained by the court below, so that the decree granting this injunction can be at any time modified in case the appellants refuse to obey the reasonable directions and regulations of the city commissioner, or the doing of acts reasonably prohibited by him. For these reasons the *pro forma* order of the Circuit Court of Baltimore city, dated the 22d of September, 1899, refusing the injunction, will be reversed, and the cause remanded, to the end that an injunction may be granted in accordance with this opinion, the court below retaining control of the case for the purpose indicated herein.

Order reversed, and cause remanded; costs to be paid in both courts by the appellees.

NOTE.—See note to next case; also note to *Commonwealth v. Warwick*, post; also note at end of Part I.

**MAYOR, &C., OF BALTIMORE ET AL. V. CHESAPEAKE & POTOMAC
TELEPHONE COMPANY ET AL.**

Maryland Court of Appeals, January 20, 1901.

CONSTRUCTION OF TELEPHONE SUBWAY ORDINANCE.

An ordinance permitting the construction of telephone conduits in streets, which has been adjudged by the courts to be a valid grant which the municipal authorities could not revoke or modify, provided that the telephone companies were to remove their poles as fast as conduits and cables should be ready for use, and not replace the poles except so far as necessary for the purpose of distribution. In an action for an injunction restraining the city from interfering with the telephone companies in the construction of further conduits,

Held, (1) That the company asking an injunction must show that it has done everything required on its part under the ordinance. (2) That since the ordinance confers upon the companies exceptional privileges and powers for their own benefit and advantage, which interfere materially with the authority of the municipality to control its streets, it must be construed strictly, and so as to conserve the public interests. (3) That according to the ordinance as thus construed, the companies must remove certain designated classes of poles before the court would interfere in their behalf.

Appeal by defendants from decree of Circuit Court, Baltimore County.

Wm. Pinkney Whyte and Olin Bryan, for appellants.

Arthur W. Machen, Bernard Carter & Sons, and Wm. S. Bryan, Jr., for appellees.

PAGE, J.: These parties have been twice before this court,—once in 89 Md. 689, and again in 90 Md. 642. It is unnecessary for the consideration of the questions involved in this appeal to refer to these cases, further than to say that by the first it was held that ordinance No. 41 created a valid and subsisting grant, which having been sanctioned by the legislature of the State,

the mayor and city council are powerless to destroy or change; and that by the second, the telephone companies, having complied with the terms and provisions of ordinance No. 41, were entitled, upon the case as then presented, to an injunction against the interference by the city with the construction of their conduits,—subject, however, to the right and power of the city to adopt reasonable regulations, etc. After the cause was remanded for the second time, the city, through its counsel, filed a supplemental answer, and it is conceded the only questions now before us are those which arise upon the issues it tenders. The substance of the supplemental answer may be thus briefly summarized. The defendants allege: (1) That ordinance No. 41, if accepted as a contract, “was based primarily upon the consideration that the telephone companies, for the privileges granted,” were to remove, within the period of two years from the date of the approval of the ordinance, “as rapidly as conduits were constructed and cables laid therein,” all poles under their control standing upon any street along which any conduits are constructed and cables laid, and that said poles should not be replaced, except in so far as such poles “are necessary” for the purpose of making distributions and connection with the wires “forming part or parts of any such cables.” (2) That the complaining companies “have not removed any of the poles,” but, to the contrary, “they have to-day, in fact, more poles in the city, along the same streets and alleys where their conduits have been laid, than they had at the time of the passage of the ordinance.” (3) That the primary consideration upon which the privileges set out in the ordinance were granted was to obtain the removal of the overhead wires, yet the complainants have not performed their part of the contract, by failing to remove such poles; it being “now well settled” that no poles or overhead wires are necessary for distribution or for house to house connection where conduits are laid. And that (4) the complainants, having thus failed to perform their contractual obligations, and in fact having violated the contract in letter

and in spirit, cannot now undertake to ask the interference of the court to protect them against the action of the city authorities in refusing to permit them to lay further conduits. It is proper to state that it appears, by the map filed among the proceedings, that all of the conduits referred to in the bill, and mentioned in the petition to the city commissioner, lie beyond the central part of the city, and are not within those districts which were called by the counsel at the argument the "congested parts of the city." The counsel for the city at the argument stated, also, that the city did not insist that the companies should, under the terms of the contract, be required to remove all the poles in streets devoted to residences, and where many wires were not required, but only in the central or business parts of the city, where many telephones are used, and therefore many wires required; that the requirements of the contract, as well as of public interest, demand that the companies should remove all poles in the congested parts of the city, it being proved that the distribution from the conduit by poles has now become obsolete and entirely unnecessary. The contention thus presented involves the inquiry whether the companies have performed the obligations imposed on them by the ordinance, and if they have not, whether notwithstanding they are entitled to the relief prayed for in the bill. As to the latter branch of the inquiry, it cannot be questioned that, when the companies ask the intervention of the court to enable them to enjoy the privileges of the contract, it is incumbent upon them to show that they have performed everything that the contract requires to be done on their part. This follows from the application of a plain principle of equity,—that one party shall not be bound when the other is not bound,—and is a well-settled rule of equity. *O'Brien v. Pentz*, 48 Md. 562; *Duvall v. Myers*, 2 Md. Ch. 402. It being incumbent, therefore, for the appellees to show that they have performed what they agreed to perform, if it should appear that they have failed to remove such poles as by a proper construction of their contract they have agreed to remove, they

would not be in a position to ask the intervention of the court to enable them to exercise further privileges under the ordinance.

The main question in this case, therefore, is, what is the duty of the companies with respect to the poles used for distribution from wires forming parts of the cables in the conduits? and that depends upon the construction to be given to the contract with the city, as contained in ordinance No. 41. It requires merely a casual glance at the words of the ordinance to show that the ordinance confers upon the telephone companies exceptional privileges and powers, the exercise of which must interfere with rights of the public in and to the streets of the city. They are authorized to dig up as much of the bed of the streets, alleys, or highways of the city as may be required for the construction of their conduits under the surface, take possession of the space so occupied, and use it at their pleasure. And this valuable right they can enjoy in perpetuity, without interference from the municipal authorities, and to the entire exclusion of the public. The ordinance therefore confers upon the companies exceptional privileges and powers for their own benefit and advantage, which interfere to an important extent with the authority of the municipality to control its own streets. In such cases it is a settled rule of construction that the contract must be construed strictly, and, if there be found words in it capable of various meanings, that interpretation should be adopted which will best conserve the public interests. This principle is so conformable to reason that it can scarcely be necessary to cite authorities, but, in order to show how it has been applied, a few examples will be given. In the case of *Attorney General v. Furness Ry. Co.*, 47 Law J. Ch. Div. 778, the Vice Chancellor said: "They (the railroad company) have a statutory right to exercise the powers which have been given them, but then they must be held to the strictest exercise of those rights." In *Fenwick v. Railway Co.*, 20 L. R. Eq. 549, the question arose as to the right of the railway company to erect a mortar mill

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close to the place of business of the plaintiff, who complained of the injury and annoyance occasioned by the vibration, etc. The railway clauses act gave them power to do all "other acts necessary for the making," etc., "of the railway," provided they shall "do as little damage as can be." The Master of the Rolls, in construing this act, after citing from Lord Chief Justice Cockburn in *Reg. v. Wycombe Ry. Co.*, L. R. 2 Q. B. 320, that "we are not to look at the convenience of the company alone, but to the accommodation and convenience of those who have rights of property which are interfered with; of those who have immediate access to the road, or who use it of necessity in the ordinary course of business,"—said it was on this principle that the act must be strictly construed. See End. Interp. St. sec. 354, and cases there cited; also *Moran v. Commissioners*, 2 Black, 722; *Baxter v. Tripp*, 12 R. I. 310; *Burbank v. Fay*, 65 N. Y. 57; *Lewis v. Board*, 40 Ch. Div. 55; *Sanderson v. Railway Co.*, 11 Beav. 497.

Bearing those principles in mind, we come now to the examination of the provisions of the ordinance. It was not controverted at the argument that the object of the ordinance was to remove from the streets, as far as possible, the great and increasing number of overhead wires. How to secure that end had even in 1889 become a serious problem; and it had become obvious also that in the not far distant future the system of overhead wires would be attended with grave perils to persons and property, and would greatly disfigure the appearance of the streets. Firemen had already found it dangerous and otherwise difficult to contend with fires; and, though telephone wires do not carry a sufficient voltage to make them dangerous to human life, it was obvious that sometimes the wires, becoming detached, and coming in contact with electric light or railway wires, or other wires carrying a greater voltage, would prove a source of peril to persons passing along the highway. In addition to this, in the congested parts of the city the hundreds of wires crossing and recrossing each other in apparently inextricable confusion

formed objects most unpleasing to the eye and offensive to the sensibilities. To get rid of this objectionable system without curtailing the conveniences of almost every class of persons in the use of the telephone, ordinance No. 41 was enacted. By its provisions the city, in consideration of the prospective removal of overhead wires from the street, agreed to accord to the companies certain privileges and powers therein mentioned. That this was the purpose of the act we think appears not only from a consideration of the external circumstances existing at the date of its passage, but from a consideration of the preamble. It is there expressly stated that the exchange, in said location, "will necessarily require, if the overhead system is wholly continued," a large and increasing number of overhead wires along the length of the streets and other public ways leading to said building, and such a concentration at a point so central as the location of said building is not desirable, and it would be to the public advantage that such wires should be laid in cable underground, etc. Now, even rigidly construed, this seems to be that these companies, being about to locate their new buildings in a central position in the city, where doubtless there were already many other overhead wires, it would be desirable to have such wires as were to be concentrated in the new building in cables underground. Such a disposition would not dispose of all overhead wires, but would inaugurate a system by which finally all wires would be taken off the street. The word "wholly," upon which the appellee's counsel laid so much stress, refers, it would seem, not to the wires of the telephone company only, but to any other wires that might then be on those streets, or might thereafter be placed there by other persons. It was not, therefore, expected that the arrangement with the companies would remove all the wires on the street, but it would at least inaugurate a system which would eventually result in the removal of all overhead wires. Now, what were the character and limitations of the privileges granted by the ordinance? The companies were authorized to lay in suitable conduits under-

ground such wires as were to be used in connection with the new telephone exchange, and "to make necessary house connections in localities where the same may be required, in such manner as may be best adapted to the location, by means of any wire or wires from such cable or cables." By the second section the companies are required to construct at least three miles of conduit within two years from the passage of the ordinance, and "after said two years and as rapidly as said conduits may be constructed, and said cables are laid therein, all poles belonging to, or under the control of, either of said companies, standing upon any street or thoroughfare in this city, along which any such conduit is constructed and cable laid, shall be removed, and shall not be replaced, except in so far as such existing pole or poles now standing, or hereafter to be maintained or erected by such companies or company, are necessary to be maintained or erected by them, or it, for the purpose of making distribution of and forming connections with any wire or wires, forming part or parts of any such cable so laid in a conduit, with the building or buildings or place or places intended to be connected with such wire or wires from such cable." There is nothing in this section or in any other that deprives the companies of any right theretofore belonging to them to extend their system by means of overhead wires; nor does the ordinance impose upon them the obligation to remove their poles anywhere, except those upon streets, alleys, and thoroughfares along which their conduits are constructed and the cables laid. The language employed is imperative in imposing upon the companies the obligation to build at least three miles of underground conduits within two years from the date of its approval; and thereafter they are to remove as rapidly as possible, and not to replace, all poles on the streets upon which the conduits are constructed. This duty to remove poles is, however, subject to the exception by which they are not required to remove such of their poles then standing, or hereafter erected by them, as are "necessary" "for the purpose of making distribution and forming connections" with the wires

constituting parts of the cable in the conduit. It is clear by this clause that the companies are not bound to remove such poles as "are necessary" for distribution; that is, for making house to house connection along the street where the conduit is laid, and also for making connection with wires on poles located on other streets.

The counsel for the companies admit that the poles thus to be permitted to remain are those only that are "reasonably required" for distribution. The words of the exception are, such as "are necessary to be maintained or erected by them or it, for the purpose of making distribution of and forming connections with," etc. It is insisted that inasmuch as the mode of distribution by poles not only to subscribers on, but to subscribers off, the line of the street was the method in use in 1889, when the ordinance was passed, that it was contemplated, and the contract must be understood to mean, that the companies are bound only to make distribution by poles. But to this contention we cannot agree. The word "necessary," in the connection in which it is used, we agree with the appellees' counsel, must be understood as authorizing such poles as are "reasonably required" for the purpose of distribution. But how must this be understood? The word "necessary" must be construed in the connection in which it is used. It is a word susceptible of various meanings. It may import absolute physical necessity, or that which is only "convenient or useful or essential." *McCulloch v. State*, 4 Wheat. 413, 4 L. Ed. 579. In the case just cited Chief Justice MARSHALL said the word "has not a fixed character peculiar to itself. It admits of all degrees of comparison." In the present case the object of the ordinance was to get rid, as far as possible, of the overhead system. To secure that end as far as was then practicable, the companies are authorized to lay conduits and place cables in them. At that date the only method in use for distribution from wires in cables—indeed, the only method, and therefore the only method that could then "reasonably be required"—was a distribution by poles. But the ordi-

nance did not contemplate that the use of poles, as to numbers and locations, should be only such as would suit the convenience or profit of the companies. They were limited to the use of such only as were necessary or "reasonably" necessary for that purpose. Nor could the intent have been that the distribution by poles should always be employed, no matter what the improvements of advancing science may have brought about. If such had been the intention, it would have been easy to have so stated. Instead of that, however, the clause in question grants the right to maintain poles on the street where the conduit is laid, upon the condition of reasonable necessity, and when no such necessity exists they must remove the poles. It would be doing violence to the clear intent of the act to hold that the companies might retain obsolete plans, when such plans would go far to defeat the purpose for which the ordinance was passed. If this were true, the whole purpose for accomplishing the extinction of the overhead system would prove a dismal failure. The cost of the new system is undoubtedly to be considered, as matter of fact, in determining whether it is reasonable that the companies should adopt it; but in itself it affords no argument in the construction of the ordinance. In *Fenwick v. Railway Co.*, *supra*, the court said: "The company may buy mortar anywhere, but it may be cheaper and more convenient to them to make the mortar at this place. * * * But we are not to look at the convenience of the company alone, but to the accommodation and convenience of those who have rights or property which are interfered with." The purpose of the ordinance was not to save the companies expense, but to accomplish a public end; and, while exact justice must be done, we should not permit the consideration of cost to the companies to be of such weight as to force such a construction of the contract as will seriously and injuriously affect the public interest. *Lewis v. Board*, 40 Ch. Div. 55; *Sanderson v. Railway Co.*, 11 Beav. 497; *Moran v. Commissioners*, 2 Black, 722; *Lessee v. Lessee*, 826 App. 105. As long therefore, as the only feasible plan of distribution was by poles,

the companies were authorized, under this contract, to use that system. But when a system which does not involve the retention of poles along the streets in which conduits are laid was devised, by which the old method of distribution was not necessary, and such new plan is feasible, and such as in all respects can reasonably be required of the companies, then, under their contract, they cannot adhere to the old system, but must adopt the new, so that the objects and purposes of the ordinance shall be carried out.

Without prolonging this opinion, we may say that the evidence in the case convinces us that poles on the streets where the conduits are laid are no longer necessary to make connection with houses on the line of that street, nor with overhead wires on the adjoining streets. As to the latter, connection may be made by underground methods, to poles standing elsewhere than on the street where the conduits are laid. In New York, Chicago, and St. Louis the distribution at least in the "congested" portion of the city, is made without the use of poles. The expert witnesses who were examined agree that in the construction and maintenance of such a system there is no mechanical difficulty. It is objected by the companies that the cost would be so great as to render the system impracticable. But we do not think the testimony sustains this. There are great differences in the calculations made by the officers and agents of the companies and those made by other persons who have testified. But there is little division of opinion as to the entire feasibility of underground distribution in the congested parts of the city, either as to cost, construction, or physical difficulties of every kind actually existing. As the proof shows that the companies still retain poles in the congested parts of the city (that is, those parts where the houses are close and many telephones in use), we will not pursue the question of cost further.

Our conclusions are (1) that ordinance No. 41 does not impose upon the companies any obligation to construct underground conduits in every or any street along which it desires

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to furnish telephone service; (2) that they are bound to remove all poles along the streets where the conduit is constructed and the cable laid, (3) except such poles as are necessary for distribution; (4) that there is a new system of distribution, not calling for the use of poles, feasible as to cost and mechanical construction, where many telephones are in use; (5) that in the congested parts of Baltimore city the new system is practicable and reasonable, and all poles therein along the streets containing the conduit should be removed, before the court will interfere to secure the right to the companies to make further extensions of their privileges under the ordinance. Decree reversed, with costs, and cause remanded.

NOTE.—This and the two preceding cases are different stages in the same litigation. See note to *Commonwealth v. Warwick*, *post*; also note at end of Part I.

NORTHWESTERN TELEPHONE EXCHANGE COMPANY V. CITY OF
MINNEAPOLIS AND OTHERS.

Minnesota Supreme Court, August 6, 1900.

(81 Minn. 140.)

MUNICIPAL CONTROL OF TELEPHONE WIRES.—UNDERGROUND WIRES.

(Head-note by the Court):

The city council or governing body of a municipality has the undoubted right in the exercise of the police power to order the placing of telegraph and telephone wires under ground whenever, in the exercise of a fair discretion, it decides that public interests require it to be done; but it cannot act arbitrarily in the premises.

An ordinance of a municipal corporation granting a telephone company the right to use its streets for the erection of poles and overhead lines, under conditions as to permits and directions where the same shall be placed, when accepted and acted upon by the company, is a contract which the municipality cannot unreasonably or arbitrarily repeal or amend so as to impair rights acquired under it.

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When such an ordinance has invited investments and expenditures, made in good faith and in reliance upon it, the city authorities cannot arbitrarily impose by subsequent regulations, without necessity, or the demands of public convenience, additional burdens upon the company which are clearly beyond the reasonable exercise of the police power.

In this case an ordinance of the city of Minneapolis construed, and Held, upon the facts set forth in the complaint and admitted by the demurrer, to constitute a contract with the plaintiff authorizing its use of streets, subject only to the reasonable and necessary restrictions of its exercise of the police power.

Cases of this series cited in opinion: *New Orleans v. Gt. So. Bell Teleph. & Tel. Co.*, vol. 2, p. 122; *Commonwealth v. Warwick*, 7 Am. Electl. Cas. —; *Rutland Elec. Lt. Co. v. Marble City Elec. Lt. Co.*, vol. 4, p. 256; *Hudson Teleph. Co. v. Jersey City*, vol. 2, p. 133.

Appeal from judgment of District Court, Hennepin county, sustaining demurrer to complaint.

D. F. Morgan, Arthur H. Noyes, and Geo. D. Emery, for appellant.

Frank Healy, for respondent.

LOVELY, J.: This action was brought to restrain the city of Minneapolis, its mayor, chief of police, and city engineer, from the threatened enforcement of certain ordinances, as illegal interferences with the rights of the plaintiff in the use of its telephone system and exchanges in that city. A demurrer was interposed by the defendants denying the sufficiency of the complaint to state a cause of action. The court below sustained the demurrer, from which order plaintiff appeals.

The complainant sets forth at length the grievances of which plaintiff complains, and facts which justify its fears that the defendants will, by the enforcement of two recent ordinances, practically destroy the value of its property, and asks for an injunction to restrain the threatened invasion of its vested rights. It is not necessary to set forth the complaint in full, but we shall call attention briefly to the facts pleaded, which have led us to the conclusion that the demurrer should have been overruled.

The telephone exchange system of plaintiff has a central station in Minneapolis, with substations, switch boards, appliances, and many thousand miles of wire in subsurface conduits, as well as upon 110 miles of lines stretched on poles throughout the city, connected, through the central station, with each other and with similar exchanges in other cities in the State of Minnesota, as well as the adjacent States of North and South Dakota, Iowa, and Wisconsin. Its general system includes numerous toll lines extending into those States, and comprising more than 3,500 miles of pole lines and 27,000 miles of wire, with public stations to the number of 600 or more, all of which exchanges and toll stations are connected with the central office at Minneapolis and with each other, affording intercommunication with more than 12,000 individual subscribers, and is of great beneficial use to the public generally. This system was completed and has been extended from time to time since 1883, in reliance upon an ordinance of the city wherein the municipality authorized the use and occupation of its streets for such purpose, and prescribed the conditions governing the same. Section 1 of this ordinance provides that plaintiff "is hereby authorized to erect, establish, and maintain within the limits of the city of Minneapolis telephone poles, and to stretch and maintain thereon the necessary wires for a telephone exchange system, according to the conditions hereinafter stated." Section 2 provides that the plaintiff "shall file in the office of the said city engineer a statement of the streets and alleys of the said city which it has already occupied under permission of the city." Section 3 provides that the plaintiff "shall file with the city engineer written application for all streets or alleys it may hereafter wish to occupy with its poles and wires," and, further, that "if such application shall be approved by the city engineer and the chief engineer of the fire department, such approval shall be deemed a permission of the city to so occupy said streets and alleys for the purpose above stated." Section 5 provides that "in case of a change of grade of any street or pavement so occupied by said company

it shall reset its poles so as to conform to the grade of such street or pavement so changed, and in such manner as the city engineer shall direct; and said poles and wires shall be removed whenever, in the opinion of the city council, the public interest shall so require." After the plaintiff had accepted this ordinance, and had established a large part of its system, the city, by an ordinance approved December 10th, 1886, required the company to remove its poles throughout a certain district defined therein, embracing business portions thereof, and including a total area of 88-100 of a square mile, and to place its wires throughout this district in cables laid in conduits beneath the surface of the streets, which requirement the plaintiff complied with at an additional cost of \$300,000. In May, 1899, a further ordinance was adopted, amending the last ordinance, whereby the original underground conduit district was enlarged to ten times its former area by the addition of 186 miles of streets not previously included therein, in which the plaintiff then maintained 70 miles of its pole line system, carrying over 3,000 miles of wire, costing \$125,000, and supplying its service to more than 2,000 subscribers residing in that territory. The complaint sets forth specifically that in the district included in the last ordinance the lines of plaintiff are so located and constructed as not to interfere with or obstruct the safety or convenience of ordinary travel upon such streets in any way, and that the whole of plaintiff's system as now extended and located therein is safe and convenient for the public use; also that the new district includes a large area of the city, very much of which is sparsely populated and settled, wherein many of the streets are not opened or graded, and that the expense of complying with such ordinance is so great that the plaintiff cannot conform thereto, but must abandon the maintenance of its system, and will, by the enforcement of the ordinance, be prohibited from the occupation of the streets within such district, except in accordance with the plan or mode prescribed, which is not required or demanded by public safety or convenience, and

which is so expensive that it cannot be adopted, to the loss of that portion of its system and the value of the business it now conducts therein, and to the injury of the entire system and the public by largely curtailing its extent and service. The complainant also alleges that in October, 1899, the city again amended the underground ordinance of 1886, wherein, with reference to this subject, it in terms provided "that until the 1st of December, 1903, the city council of the city of Minneapolis may permit the erection of poles, brackets, wires and fixtures within the new territory, subject to the right of the city council to cause the removal of such poles, brackets, wires and fixtures at any time it may order and direct the same to be removed," which is claimed to be an unreasonable and arbitrary discrimination in the granting and refusing of privileges before granted and provided for, without regard to the places or persons affected, or the public requirement, or the circumstances upon which the same may be desirable. It is alleged further that repairs, extensions, and renewals of lines throughout the telephone districts of the city are necessary, and must be made from time to time, to keep them safe and efficient for public service. It appears also that after the adoption of the last ordinance the plaintiff has requested from the proper authorities permission to make repairs and extensions of its lines, which privileges have been refused, under the alleged authority of the last two ordinances, and plaintiff's servants, in attempting to make the same, have been arrested, and forbidden under penalty of arrest from making necessary repairs, in maintaining such lines.

It is asserted by plaintiff that the action of the city in the respects referred to and in its requirements thus brought under review constitutes an unlawful impairment and interference with its vested contract rights, and amounts to a destruction and confiscation of its property by a prohibition of the use and enjoyment of its franchises, for which damages are sought to be recovered, and it is asked that by injunctive order the defendant be restrained from further enforcement of the subsequent

restrictions, or any interference with its legal contract rights and privileges secured under the ordinance of 1883. In view of the disposition which we deem it our duty to make of this appeal we shall only consider the effect of the original ordinances under which the plaintiff was authorized to establish and maintain its system, in connection with the ordinances of May and October, 1899, under which the rights of the plaintiff, as set forth in the complaint, are and will be violated by the city unless restrained by injunction. It is claimed on the part of the defendant that under the charter of the city in the exercise of its governmental powers it had the right to enact and enforce the two ordinances referred to without reference to their reasonableness or effect upon the contract rights plaintiff possesses by reason of its prior acceptance of the ordinance under which its system was established. On the argument to support this theory, counsel for defendant put the issue as a contest between the authority of the common council to rule the city on the one hand, and of the telephone company to violate the restraints of municipal control on the other. Without discussion of principles that are fundamental, it is enough to say that such an issue is not raised by this demurrer. The questions presented doubtless involve the authority of the common council, but we need not cite authorities to support the self-evident elementary principles essential to any government that such authority must not be arbitrarily exercised. It is not a question of "rule or ruin" between the city and the telephone company. Neither may rule the other. Both are subject to "the law of the land;" and if the ordinance of 1883, which was accepted by the plaintiff, and large expenditures of money made in reliance thereon, is a contract between the city and the plaintiff, the latter cannot wrongfully, and in disregard of justice, without right or reason be deprived of its vested rights obtained thereby, without a plain and palpable violation both of the State and Federal constitutions. That the effect of the first ordinance, and the acceptance and expenditures of large sums of money by plaintiff in re-

liance thereon, established such contractual rights between the parties, we have no right to question either upon principle or authority. An ordinance of a municipality, surrendering a part of its powers to a corporation to secure and encourage works of improvement, which require the outlay of money and labor, to subserve the public interests of its citizens, when accepted and acted upon, becomes a contract between the city and the corporation who relied upon it, and the grantee cannot be arbitrarily deprived of the rights thus secured. They are protected by the organic law which forbids the impairment of contracts or interference with vested rights without due process of law. *Cincinnati v. Smith*, 29 Ohio St. 292; *Chicago v. Sheldon*, 9 Wall. 50; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 6 Sup. Ct. 273; *City Ry. Co. v. Citizens' St. R. Co.*, 166 U. S. 567, 17 Sup. Ct. 653; *Cincinnati v. Village*, 36 Ohio St. 634; *City v. Great Southern*, 2 Am. Electl. Cas. 122, 40 La. Ann. 41, 3 South. 533; *City of Burlington v. Burlington St. Ry. Co.*, 49 Iowa, 144; *Com. v. City of Boston*, 97 Mass. 555; *City v. Wheeler*, 88 Wis. 607, 60 N. W. 818; *City of St. Paul v. Chicago, M. & St. P. Ry. Co.*, 63 Minn. 330, 63 N. W. 267, 65 N. W. 649, 68 N. W. 458. These are but a few of the many authorities which clearly enunciate the rule above stated, the reason for which is founded upon the most obvious principles of justice, as well as sound policy and public necessity; for no one would invest his money to further any plan of improvement for his own as well as the general benefit if the right to the advantages which he as its promoter expects to derive from its success might be destroyed by the uncertain or capricious inclinations of the governing body of the municipality.

If the city could not arbitrarily violate the contract embraced in the ordinance of 1883, after its acceptance by the company, it must likewise be acknowledged that the plaintiff was subject to such reasonable regulations as might be, by the city authorities, adopted for the good government of the municipality to secure the necessary advantages of urban control by its citizens,

and their reasonable rights as such, of which it is the conservator. Unquestionably there is a continuing right by the city to regulate its local affairs. This right is what is universally known as the police power. It exists intact without reservation in the constitution, and it cannot be surrendered, so that the franchises of private corporations must be conclusively presumed to be acquired with reference to its existence, and contract rights must yield to the proper burdens imposed by growth and development. Elliott, Roads & S. 58, 60. But this extensive power of regulation is not to be exercised at mere whim or caprice. It should be appropriate to and commensurate with the public necessity for the protection and promotion of public morals, health, safety, necessity, or convenience (*City of Burlington v. Burlington St. Ry. Co.*, 49 Iowa, 144-147); and the application of the police power cannot be extended by the authority which is intrusted with such application to an arbitrary misuse of private rights. Any such unwarranted exercise of authority is unconstitutional and void. *State v. Addington*, 12 Mo. App. 214; *City of Saginaw v. Swift Electric Light Co.*, 113 Mich. 660, 72 N. W. 6. Recently the subject of municipal control over the erection and maintenance of poles and electric wires in the streets of cities has received particular attention from the courts, and it has been held that an electric company, which has been granted, by the local authorities, the right to use the streets, and has constructed its line in compliance with and in reliance upon the terms and conditions of such grant, cannot be made the subject of new conditions, aside from what may necessarily be required of it by the city in proper exercise of the police power and the control and regulation of the streets. *Com. v. Warwick*, 185 Pa. St. 623, 7 Am. Electl. Cas. —, 40 Atl. 93; *Louisville Trust Co. v. City of Cincinnati*, 47 U. S. App. 36, 22 C. C. A. 334; *Levis v. Newton* (C. C.), 75 Fed. 884; *City v. Great Southern*, *supra*; *Rutland Co. v. Marble City*, 4 Am. Electl. Cas. 256, 65 Vt. 377, 26 Atl. 62; *State v. Mayor*, 2 Am. Electl. Cas. 133, 49 N. J. Law, 303, 8 Atl. 123. We

need not go further in disposing of the demurrer than to apply the doctrine established by these authorities, for it is easily applied to the facts which are conceded by the demurrer. The additions of ten times the area through which underground conduits must be constructed at an enormous additional expense, without necessity, is violative of the contract entered into between the city and the plaintiff in the ordinance under which the system was established. The requirements imposed by the later ordinance upon the company to build such conduits through ungraded streets in suburban parts of the city and in the open country, is clearly, upon its face, unreasonable, and the claim to exercise such right on the part of the common council of the city at their "will and mere motion" cannot be sustained in the reasonable exercise of the police power, or upon any theory that is consistent with the acquired and vested rights which the plaintiff enjoys under the constitution and the laws. The authority thus demanded by the city touches the limits of absolutism, and, if the right of plaintiff to use its franchise depends upon it, it amounts to an unnecessary destruction of property rights, which no municipality can or ought to exercise, and does not receive the sanction of this court.

We cannot agree with the court below that the provisions of section 5 of the ordinance of 1883, which provides for the removal of poles by direction of the municipality, contains a reservation of authority in the city to enforce the removal of the same at its pleasure. Conceding that the provisions of section 5 extend to the whole ordinance,— which we do not decide,— and thereby authorized the city to order the removal of the poles from streets not being graded, such power cannot be unreasonably and arbitrarily exercised. This provision manifestly implies the exercise of judgment upon such necessities as are always liable to arise in improving the streets, to be enforced only for the public good in the administration of municipal functions, under the authority of the police power. In a proper case, where the city exercises its power of control in the regula-

tion of the use of the streets by the plaintiff, based upon necessity and the interests of the public, that power will be sustained. Beyond that limit it cannot go. The reservation, in the ordinance of October, 1899, to the city, of the right to grant or refuse the occupation of the streets at its own will, is nothing better than a declaration of a right to arbitrarily grant or refuse the privileges to which it refers. The two ordinances of May and October, 1899, which upon their face and in terms seek to amend the first underground ordinance of 1886, are to be read and construed together as one enactment; for, when such an amendment is adopted, there are not two separate enactments, the old and the new, but by their union there is produced one law, viz., the ordinance as amended. Black Interp. Laws, pp. 356, 357. When these ordinances are read together, as they evidently should be, under the facts admitted by the demurrer, they are, as a whole, void, for they are clearly open to the objection which is best stated in a leading authority in the highest court of the land upon a similar question: "They seem to confer, and do actually confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons. * * * The power given * * * is not confined to discretion in the legal sense of that term, but is granted at mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint." *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064; *People v. Mutual*, 38 Mich. 154; *City v. Great Southern*, *supra*; *State v. Finch* (Minn.), 78 Minn. 118, 80 N. W. 856.

We do not intend, in the disposition of this case, to abridge the wholesome right of the municipal government to regulate their internal and domestic affairs within the limits essential to the welfare of their citizens. A city has the right to enact reasonable ordinances, and to enforce them; but it is the conservator, not the autocrat, of the police power. It may originate its useful authority, and apply it by specific and valid regulations;

but that exercise is not despotic, nor absolute, but is open to review, and an ordinance that upon its face is unreasonable and arbitrary is subject to judicial examination. When it is not bounded by a fair and wise administration of municipal authority, but is unreasonable and arbitrary, it will be declared void, and the municipality restrained from its enforcement. *Evison v. Railway Co.*, 45 Minn. 375, 48 N. W. 6. To prevent any misunderstanding, we add that the complaint tenders the issue that the city council arbitrarily and without any reasonable necessity enacted the ordinance complained of. The demurrer admits the allegations of the complaint in this respect, and our conclusion is based upon this admission. If, however, the plaintiff on the trial fails to establish such allegations by competent evidence, it must comply with the ordinance, for it is not to be doubted that the city council has the plenary power to extend the subsurface district wherever, in the exercise of a fair discretion, it decides that public interests require it to be done; but it cannot do so arbitrarily in the premises as alleged in the complaint.

We have not thought it necessary to consider the claim of counsel for defendant that the charter of the city of Minneapolis authorized or warranted the adoption of the ordinance of 1899, if, in the view which we have taken, which is expressed above, such charter provisions would be in violation of the constitution; but our examination of the subject does not lead us to the conclusion that there is any inconsistency between the charter of the city and the rights of the plaintiff as justifies such claim. The order of the trial court sustaining the demurrer is reversed, and the case is remanded for further proceedings according to law.

NOTE.—See note to next case; also note to *Commonwealth v. Warwick*, post.; also note at end of Part I.

NORTHWESTERN TELEPHONE EXCHANGE COMPANY v. CITY OF
MINNEAPOLIS ET AL.*Minnesota Supreme Court, May 10, 1901.*

TELEPHONE.—UNDERGROUND WIRES.

(Head-note by the Court):

Held, that under the general laws of this State (sec. 28, c. 34, Gen. St. 1866), as amended by chapter 73, Gen. Laws 1881 (sec. 264, Gen. St. 1894), telephone companies are given the right to erect poles and wires within the urban ways and streets of this State as well as upon rural highways.

That the provisions of the charter of Minneapolis confer upon that city no authority to arbitrarily order a removal of such poles and wires, but only the right to regulate the placing of the same in its streets, and to compel the telephone companies to put their wires in subsurface conduits when reason, convenience, or the good government of the municipality requires.

Case of this series cited in opinion: *Oater v. N. W. Teleph. Exchange Co.*, vol. 5, p. 111.

Rehearing.

D. F. Morgan, A. H. Noyes, and G. D. Emery, for appellant.*Frank Healey (W. A. Lancaster, of counsel)*, for respondents.

LOVELY, J.: The public importance of our previous decision upon the control by the municipalities of this State of their streets in the use of the same by telephone companies, as well as the fact that full consideration was not given in the original opinion to the subject of legislative authority for such control, nor to the dependent rights of the telephone companies thereunder, has required a reinvestigation of the whole subject upon a reargument. Counsel for the respective parties have not only fully reargued all the questions submitted on the previous hearing, but have filed extensive additional briefs. We have been further aided by the briefs of counsel in

a similar case arising in the city of Duluth, which have been of much assistance, and have been fully considered in the result reached. It was urged for respondent that the court, in its opinion, had assumed that the authority to make the contract upon which the decision rested, between the telephone company and the city, existed, without pointing it out, while in fact no such authority did exist. It is true, such authority was not, in fact, discussed in the opinion. The course on the oral argument by counsel, and the pressing demand for a speedy decision, were to some extent responsible for this omission. The opinion rested principally upon the allegation in the complaint that the city council, in the adoption of two recent ordinances of 1899, had acted arbitrarily, without reason or necessity, after the plaintiff had, at the invitation of the city, upon privileges received, and in consideration of public utility and benefit, expended large sums of money in availing itself of the rights granted in a previous ordinance of the municipality. We recognize that important questions other than those actually referred to in the opinion are material to the disposition of the order of the trial court, and have regarded it as our duty to reconsider so much of the subject involved, determinative of this appeal, but not referred to in the opinion, which we think may be embraced comprehensively in the following propositions: (1) Did the telephone company have any right from the State to erect its poles and wires in defendant's streets? If so, what was the nature and extent of such right? (2) Did the city possess a delegated power to control, limit, regulate, or restrict the placing of poles and wires by plaintiff in its streets? And, if so, what were the limitations of such right?

1. What were plaintiff's rights under the general laws of this State? It was claimed that we had overlooked the fact in the previous opinion that under the decisions of this court the city of Minneapolis had no power to make the contract with the telephone company, for the reason that such power must necessarily be derived from the State, where it originally belonged,

as an element of its sovereignty, and that the State has never delegated such power to the city, from which conclusion it would necessarily follow that the contract between the city and the company was in excess of authority. The decisions invoked to support this position undoubtedly sustain the view that the plaintiff must necessarily rest its authority upon a prior grant of power from the State. *Nash v. Lowry*, 37 Minn. 261; *City of St. Paul v. Chicago, M. & St. P. Ry. Co.*, 63 Minn. 330, 63 N. W. 267, 65 N. W. 649, 68 N. W. 458, 34 L. R. A. 184. It is not to be questioned that this original element of State control over its public thoroughfares might be legally delegated to municipalities, even to the power of excluding poles and wires entirely from urban streets. In such case the streets cannot be used except by permission of the city, who can restrain such use without reference to public benefit or advantage; and this conclusion presents the necessity of referring to the general legislation of the State, where authority to use such thoroughfares for poles and wires must be found, if it exists.

In 1880 the following statutory provision applicable to telegraph companies was enacted:

"Any telegraph company incorporated or organized under the laws of this State, shall have full power and right to use the public roads and highways of this State, on the line of their route, for the purpose of erecting posts or poles on or along the same, to sustain the wires or other fixtures; provided, however, that the same shall be located as in no way to interfere with the safety or convenience of ordinary travel on or over the said roads or highways."

This section was incorporated into the revision of 1866, where it continued without change until 1881, when this statute was amended by inserting after the word "telegraph" the words "or telephona." Chapter 73, Gen. Laws 1881 (section 2641, Gen. St. 1894). In passing, it may be well to say that this court has never recognized any difference in character between telephone and telegraph companies. "The transmission of intelligence by telegraph or telephone is a business of a public character, to be

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conducted under public control, in the same manner as the transportation of persons or property by common carrier." *Cater v. Exchange Co.*, 5 Am. Electl. Cas. 111, 60 Minn. 539, 63 N. W. 111, 28 L. R. A. 310. And again, as vigorously expressed in a later opinion of this court (COLLINS, J.): "In these days there ought to be no one to question the statement that the telephone is simply an improved telegraph." *Northwestern Telephone Exch. Co. v. Chicago, M. & St. P. Ry. Co.*, 79 N. W. 315. In practical application, it is not easy to recognize any difference in the subject-matter (the erection of poles and wires on public highways), in the manner of erecting and maintaining the same, the public benefits to be derived, or the burdens to be created, although the more extensive use of telephone exchanges has given to the latter improvement a greater utility; but, for the purpose of construing the effect of the legislative enactment referred to, no distinction can be made in favor of telegraph over telephone companies, in the imposition of burdens upon the public thoroughfares of this State. It is well known to every one that the telegraph companies have always had their offices in business centers, at which places only intelligence has been transmitted and delivered for the benefit of their patrons; and it is likewise as well known that at no time since the first enactment of the statute, in 1860, have telegraph companies directly delivered from their wires messages at private residences on rural highways, while their poles and wires have been erected and continued over the same at all times. The difference between the use of the streets by telegraph and telephone companies in this respect is worthy of note. For nearly ten years after the amendment of 1881 was adopted, the benefits conferred upon telephone companies were not used upon rural highways, but to a great extent on city streets. It was not until after 1890 that the long-distance telephone, for which such use would have been available, was known in this State. Within a very short time thereafter the cities and villages throughout the country were connected, largely through the imposition of the servitude previously en-

joyed only by telegraph companies, and such highways made subservient thereto. These historical facts, of which the court must take notice, are to be borne in mind, to appropriately apply the statute; for if the legislature, by the use of the words "roads" and "highways" therein, intended to adopt the popular sense in which these words were understood, such intention must prevail, and be held to have given authority to the plaintiff to erect its poles and wires within the highways of defendant and other cities throughout the State, for the legislature must be understood to mean what it has plainly expressed. Where the legislative intent is plainly expressed, so that the act, read by itself, or in connection with other statutes pertaining to the same subject, is clear, certain, and unambiguous, the courts have only the simple and obvious duty to enforce the law according to its terms. This is elementary. *Suth. St. Const. sec. 237.*

It is contended by defendant that such was not the legislative intent in the enactment of the amended statute of 1881, which gives the same right to telephone as to the telegraph companies, but that a distinction was intended, and must be now applied, in construing this statute, as between urban and rural highways, limiting such use solely to country roads. The definition of a word in a statute need not be absolutely decisive of its meaning in all cases. The history of the act, its general purpose, the mischief to be cured or benefits to be obtained, according to general understanding, as well as the sense to be derived from its connection in the same or other statutes, may be essential to aid courts in the duty of construction. But, in a legislative enactment that has continued for many years without cavil or question, the first source of inquiry is the popular meaning of the words employed to express its sense, and furnishes the natural and reasonable, as well as the primary, legal source of interpretation; and for authoritative definitions we necessarily turn to the standard dictionaries of our language. The popular meaning of the word "road" is defined in the *Century Dictionary* as "a public way for passage or travel; a strip of ground appro-

priated for travel, forming a line of communication between different places; a highway; hence any similar passage for travel, public or private." The same authority defines the word "highway" as "a public road or passage; a way open to all passengers by either land or water." The approved legal definition of "highway" is "a passage or road through the country, or some parts of it, for the use of the people. It is the generic name for all kinds of public ways." Bouv. Law Dict., "Highways." The word "highway" has been used in its generic sense extensively in decisions of the courts to which our attention has been directed in the briefs and arguments of counsel, and it does not appear from such use that any distinction has been made in the application of the word "highway" to a country road which would distinguish it from an urban street or way. A very distinctive recognition has been made by our own court of the use of the term "highway" as applicable to city streets, whereby, in chapter 13, sec. 47, Gen. St. 1878 (sec. 1832, Gen. St. 1894), it is provided that "when any road or portion thereof shall have been used and kept in repair, and worked, for six years continuously as a public highway, the same shall be deemed as having been dedicated to the public, and be and remain, until lawfully vacated, a public highway." Under this section, notwithstanding its reference to the town in which the road is located, the same has been considered as applicable to incorporated municipalities. *Village of Benson v. St. Paul, M. & M. Ry. Co.*, 63 Minn. 198, 64 N. W. 393; *Hall v. City of St. Paul*, 56 Minn. 428, 57 N. W. 928; *Elfelt v. Railway Co.*, 53 Minn. 68, 55 N. W. 116. We might collect authorities without number to show that this term has been applied in judicial decisions, in its generic sense, to city streets. The result of such investigation leads to the conclusion, seemingly too plain for serious discussion, that the word "highway" in actual use, embraces city streets as well as country roads, furnishing the strongest inference that it was intended to apply to both, and that, while the word "street" is more often used than "highway" to designate an urban way, yet

it was in this statute used for both purposes. We cannot, therefore, by looking through the charters of different cities where the words "street" and "highway" are used, respectively, in reference to urban thoroughfares, and by comparing the result, necessarily determine any distinction in this respect; for where a word of general import covers two classes, and another only one, the obvious and sensible inference would be that the general term was intended to embrace both, and we do not discover from the reading of the statute under consideration any intention to restrict or limit the general meaning of the word in this respect. The suggestion that the proviso limiting the erection of posts or poles so that the same shall "in no way interfere with the safety or convenience of ordinary travel on or over said roads or highways" is more applicable to rural than urban streets is of little significance, or that such restriction is ordinarily a subject of municipal control under charter provisions has no persuasive force in construing into this law the distinction urged. Ordinarily travel takes place on city streets as well as rural roads, and the proviso would go no further than to secure protection when needed. Besides, at the time this statute and its proviso were first adopted the population of Minneapolis, now the largest city in the State, was less than 3,000 people, and the State, in its infancy, encouraged all public improvements with great liberality; and if the words "ordinary travel and convenience," in any popular sense, are more applicable to country than city places, which is not clear, the restriction in the proviso at that time would apply to a greater part of the area included in the cities of the State with as much force as to any country road. Since it cannot be disputed that a city street, in the popular sense, is a highway, and that the plaintiff, under the statute, may use highways under the limitation so as not "to interfere with the safety or convenience of ordinary travel," it follows that the statute must be treated as having meant what it said. A more critical examination of its language than is furnished by its ordinary reading is not useful or even possible. A statute must

be treated as a living thing, but oftentimes it is dissected as if it were a dead letter. Our duty is not to make an autopsy upon its remains, but to sensibly discover what it means; we apprehend that the reasons which led to its enactment, as well as the manner in which it has been treated by our people and the legislature, if consonant with its sensible meaning, would prevail. Any other course would require us to usurp functions we do not possess. It is our duty to construe the statute, not to amend or repeal its provisions.

If we recur again to the historical facts which assist in defining the meaning of this law, we find that, so far as the placing of poles and wires on highways is concerned, that right was created by legislative action more than forty years ago, and it has continued in force and materially aided in the growth of this great commonwealth; and the only change of such right, until 1893, has been an extension of its benefits. For twenty years the telegraph companies of this State applied its terms comprehensively to cover their necessities upon all public ways, both rural and urban, when the telephone companies were given the same benefit. For ten years thereafter, at least, the telegraph companies exercised the same privileges as before, while the telephone companies during the intermediate period between the amendment and the origin of the long-distance service derived no other benefits than within the urban districts to which they confined their business, and to which it is now claimed the statute did not refer. In other words, the telephone companies were using, under the benefits of this statute, without apparent objection, the places where it did not, on defendant's theory, apply, and did not use the only places where it did apply, while the telegraph companies were using both for the same purpose; and the inference that follows is obvious, and lies upon the surface: The people understood the law to mean what it said, and had found it sufficient to meet the necessities of the people of this State, and consonant with the demands of growth and progress, and for thirty years and more its benefits as to both kinds of companies were accepted, and it was not amended or changed.

The strongest argument in support of defendants' contention that there was a reserved legislative purpose to exclude urban thoroughfares from the benefits of the statute is that such a restriction has been practically placed upon the statute by the plaintiff itself. It is urged that plaintiff and others similarly situated have repeatedly sought concessions from municipalities, particularly from defendants, at variance with the right to use their streets, which it now insists upon; that the privilege of placing poles and wires in the streets has never until the present time been demanded as a right, but has been accepted (as under the ordinance of 1883, set forth at length in the former opinion), and the fact that the plaintiff has recognized the power of the city to control this subject is to be given weight; and this, to a certain extent, is true, although to what extent, and how far such privileges have been asked for and received, in the absence of any reliable data, it is not easy to determine. There is some logical force in this claim, although it cannot be deemed controlling, nor sufficient to overcome the spirit of the statute expressed in its literal terms; for it is in opposition to the source of the real authority to construe the law, which is judicial, and vested in the courts. If the meaning of the words of the statute were doubtful, the interpretation which the telephone company and the city have placed upon its meaning might be more weighty; but where there is no doubt, or private policy and self-interest dictate the action of either party, such argument is of very little force. Were it clear that no such authority to use urban ways had been vested in the telephone company by the general statute, its assertion or assumption of such right would not create it, or, if a reasonable construction would not permit such a view, the plaintiff could not determine the question by its own acts. It would still be for the courts, rather than the plaintiff, to construe the meaning of the law.

If the views we have expressed above are correct, the actual right to use the highways of the State, either in cities or upon country roads, subject to necessities of ordinary travel, was con-

ferred upon plaintiff. The defendant has for years assumed control itself of this right, and contracted with the plaintiff on that basis, notwithstanding the statute; but the city now disclaims that it had such right, and it would be hardly a conclusive argument for the plaintiff to say, in answer to this claim, that the city did not have such right, because it had construed the statute against itself in this respect, by adopting the ordinance of 1883, and could not repudiate its *ultra vires* acts. The peculiar nature of the telephone business is such that the plaintiff and defendant do not stand upon equal grounds in dealing with each other, and, notwithstanding the provisions of the statute authorizing the use of city streets, the exactions of the municipality might well be such that any hostile treatment of the plaintiff might greatly injure its business and deprive it of the benefits to be derived therefrom; and it is quite easy to see how the plaintiff might well desire to avoid friction with or antagonism from the city in the enjoyment of its franchises. Again, if the city, as we conclude further on, had the reserved power of regulation, in the interest of public convenience and necessity, in the placing of telephone poles and wires in particular streets or in sub-surface conduits, such right would justify action on the part of the city that would necessitate concessions that the city would be authorized to make in formal respects, and the argument based upon the practical construction of the statute falls to the ground.

We have not overlooked two recent enactments affecting the subject. In 1893, for the first time, a restrictive proviso was incorporated into an amended section of title 1, sec. 1, c. 34, Gen. St. 1878 (title 1, sec. 2592, c. 34, Gen. St. 1894), providing for the organization of corporations, to the effect that no franchise should be granted to telegraph or telephone companies that would authorize them to place their poles and wires in city streets without permission of the municipality. Gen. Laws 1893, c. 74. And to the same effect is Gen. Laws 1899, c. 51. The plaintiff was organized as a corporation in 1878. It obtained the benefits of the act of 1860, above referred to, in 1881, which became

a contract between the State and the plaintiff by the acceptance of the same. Hence the proviso in the law of 1893 and 1899, being prospective, could not impair rights that had become vested, because forbidden under the clearest prohibitions in the State and Federal constitutions; and it is not claimed that these statutes did so, nor is it possible to treat the latter proviso as a legislative interpretation of the original act of 1860, which had been continued in force up to that time, without change, unless the inference follows, for what it is worth, that these restrictive provisions were enacted to impose upon companies organized in the future an obligation which was by the legislature not supposed to be expressed in any previous statute. This inference favors plaintiff's contention.

As a result of this review of the subject, we are led to the conclusion that the plaintiff had a right to use the streets of the city, under proper regulations and restrictions (referred to in the original appeal) by the municipality. What such power of regulation in the city imposed in its relation to the plaintiff is still to be considered. Since the first argument in this case the general statute (section 2641, Gen. St. 1894) has been judicially construed by the United States Circuit Court of this district, and the conclusions expressed above find authority therein, as well as the necessary deduction that any ordinance of the city interfering with or impairing the vested right thus conferred upon the plaintiff by the State violated constitutional rights and was invalid. *Abbott v. City of Duluth* (C. C.), 104 Fed. 833.

2. It still remains to consider such provisions of the city charter as affect the subject under the inquiry, did the city possess a delegated power to limit and regulate the placing of poles and wires by plaintiff in its streets; and, if so, what were the limits upon such right? The provisions of the defendant's charter germane to this subject at the time when the ordinance of 1883 was enacted by the common council in the exercise of the delegation of power to defendant over its streets gave it the right, under subdivision 6, sec. 5, c. 4, "to prevent the encumbering of

streets, alleys, lanes, sidewalks, public grounds, or wharves with carriages, carts, wagons, sleighs, boxes, lumber, firewood, posts, awnings or any other materials or substance whatever;" and by subdivision 31, sec. 5, c. 4, the power "to remove and abate any nuisance, obstruction or encroachment upon the streets, alleys, public grounds and highways of the city;" and by sec. 1, c. 8, "the care, supervision and control of all highways, streets, alleys, public squares and grounds within the limits of the city." Such was the power delegated to the city council to adopt the ordinance of 1883, set forth at length in the opinion, which conferred upon the plaintiff the right to use and occupy the streets and alleys of the city with its poles and wires. Nothing in the provisions above quoted conflicts with the power to pass such ordinance. On the other hand, under such general provisions, even in the absence of the general statute (section 2641, Gen. St. 1894), it might be held that sufficient power was so delegated for that purpose. In a recent case decided by the United States Circuit Court of Appeals for this circuit, it was held (*SANBORN, J.*), under a statute where the city of Colorado Springs was empowered to regulate the use of its streets, to provide for the lighting of the same, and to pass all ordinances and to make all rules and regulations demanded or necessary to exercise those powers, that "it had the implied authority to grant the right and privilege to construct a power house to generate electricity on its public grounds," etc. *Pikes Peak Power Co. v. City of Colorado Springs* (C. C. A.), 105 Fed. 1. Thirty-four days after the passage of the ordinance under which the city attempted to grant the right to the telephone company to erect its poles in its streets, the charter of the city was amended by adding to section 5, c. 4, the following authority to be exercised by the council: "To regulate and control or prohibit the placing of poles and the suspending of electric and other wires along or across the streets of said city, and to require any or all already placed or suspended either in limited districts, or throughout the entire city, to be removed or to be placed in such manner as it may designate be-

neath the surface of the street or sidewalk." This provision does not declare that the power therein conferred is exclusive in the city, nor that the right to remove poles and wires in the streets is to be exercised by the city arbitrarily. If the general statute (section 2641, Gen. St. 1894) is controlling, as we have held above, this provision should be construed so as to harmonize with that statute, and not given such a construction as would give absolute power to the city to remove wires and poles without reason or necessity, for such a view would clearly interfere with plaintiff's vested rights; or if, as we are led to believe, there was authority under the previous provisions of the charter in force at the time the ordinance of 1883 was enacted and accepted by the plaintiff, it follows, as held in *Pikes Peak Power Co. v. City of Colorado Springs, supra*, that an ordinance of a city passed under legislative authority, within the provision of the Federal constitution, "cannot be repealed by later ordinances which would be so clearly a violation of section 10, art. 1, which prevents the passing of a law impairing the obligations of a contract, and the fourteenth amendment to the constitution, which forbids the taking of property without due process of law," that, as held in that case, "no argument to the contrary would be worthy of a moment's consideration."

So far we have considered this question with reference to the rights of the plaintiff, upon the allegations of the complaint well pleaded that allege that defendant was arbitrarily attempting to interfere with plaintiff's rights; but the provisions of the city charter which we have quoted do possess a force and vitality in authorizing such control and regulation of plaintiff's business by the city that they must not be overlooked. We think much misunderstanding has arisen from the previous opinion, through a failure to realize what was actually determined. We have not held, and do not hold, that the city had the power to confer upon the plaintiff vested rights to irrevocably occupy its streets, in violation of any reasonable right therein by the city. We hold that the only power delegated by the State to the city under any

of the charter provisions referred to is the power of regulation, and the necessary control incident to such power. We held in the former opinion, and now hold, that the only contract entered into by the city with the defendant was with reference to the manner and method of placing its poles and wires. Such contract was within the police power of the city, and, the defendant having acted upon the contract by the ordinance of 1883 as to how it should place its poles and wires, the city cannot, without reasonable cause, in the exercise of its power of regulation, revoke its contract as to such matters, and order a different arrangement. The power of regulation, or the police power, as there designated, belonged to the State, and was delegated to the city in its charter; and we think that the charter provisions referred to fully recognize its beneficent authority, which should be exercised in reason and judgment for the best interest and welfare of the municipality, and secures all that is essential to a proper and reasonable control of the plaintiff's business. It is not to be assumed that the legislature, in delegating such powers, intended to violate the organic law, or (what would be, perhaps, as bad in its practical effect) to invest the defendant with the power to confer a monopoly in the use of its streets to a favored corporation, which is the logical and necessary result of defendant's claim. If the claims of the city are well founded upon the issue raised by the demurrer, it can grant a right to-day, and deprive the party to whom it is granted of such right to-morrow. If it can confer the privilege upon the plaintiff of placing overhead wires on the streets, and immediately thereafter compel the plaintiff to replace the same in subsurface conduits in rural neighborhoods, where there is no reason or necessity for such change, which purpose is admitted by the demurrer in this case, it might immediately thereafter compel the removal of the wires so placed in subsurface conduits. Nor is such a result impossible of conjecture. Oscillations of power in local government do not always vibrate from the same center, for history is full of illustrations to show that the guardians of the people may become

their oppressors, through injurious monopolies that deprive the people of their privileges. The safeguards of the constitution are the ultimate refuge from such usurpations, and it cannot be believed, when we consider the extreme and justifiable jealousy which has existed on the part of the lawmakers to guard against the abuses of power, that they could have intended to confer by doubtful terms an arbitrary right upon any municipality in this State unreasonably to deprive its citizens of the benefits of progress or to grant monopolies.

The solution of the question involved in this case is not difficult, and is consistent with every reasonable interest that belongs to the people of the city of Minneapolis. The plaintiff has the right to use its streets in the way prescribed, but such right is subject to regulation; and if the use of any street for overhead wires, or any other placement of its lines, is injurious to public safety, convenience, comfort, or utility in the management of city affairs, or inconsistent with reason, order, and good government, the city has the power, under the law and its charter provisions, to compel a removal of such poles and wires from its streets, and compel them to be placed in subsurface conduits, or to otherwise regulate the business of the company so that the use of its streets shall not interfere with the rights of its citizens, but subserve their welfare, in the inestimable service which the telephone renders to commerce, civilization, and the happiness of its people. This case comes here upon statements in the complaint as to what the city is attempting to do that may or may not be true. We are required, upon the admissions made by the defendant itself in its demurrer, to accept such statements; and, accepting them, we have simply determined that what has been well pleaded and alleged shows an exercise of arbitrary and absolute power on the part of the city, and cannot be sustained. We have determined no facts, but only assumed that to be true which defendant has admitted. In the tribunals of the law, within the jurisdiction where this plaintiff and defendant are conducting this contest, there is no doubt, it seems to us, but

what a determination should be reached upon the actual facts, with which no fault should be found by anyone who cares more for the benefits of good government and the best interests of the people than for the assertion of arbitrary rights.

We have noted the point that the defendant claims that injunction is not the proper remedy; that it was the prerequisite duty of the plaintiff to have applied for permission to place its poles to the city engineer, and, on his refusal, to seek its rights through mandamus. This is not a case where ministerial officers have refused to perform a duty imposed upon them by law, but where the city itself, by the enactment of ordinances, prohibits its officers from performing such duties. In such a case injunction is clearly the proper remedy. What we have stated above, in addition to what is held in the original opinion, must be deemed a disposition of the claim that section 5 of the ordinance of 1883 gave the city the arbitrary power to remove poles at its pleasure, and we adhere to our former conclusions in this respect.

While we have not noticed particularly all the points suggested by counsel on the reargument and briefs, they have all been fully considered, and we have covered the propositions which seem to us to be decisive; and we have reached the conclusion—which seems to us as clear as can be realized in any disputed legal controversy—that the power to place poles and wires in the streets of municipalities in this State has been conferred upon the plaintiff by the legislature; that the question as to the manner in which this power should be exercised to meet the demands of convenience and necessity was within the authority of the city; that the ordinance of 1883 was, to a certain extent, so far as manner and form, at least, are concerned, the subject of contract obligation; and that the subsequent ordinances of May and October, 1899, as alleged in the plaintiff's complaint and admitted by the demurrer, impose such burdens upon the plaintiff as to impair their legal contract rights, and to that extent must be restrained, leaving the question of fact yet to be determined,

whenever raised in the proper manner, whether the provisions of these ordinances, or of any other that may be adopted, are within the limits of wholesome and proper municipal regulation. For the reasons stated above, we abide by the former opinion of this court, and the order sustaining the demurrer is overruled, and the case remanded.

START, C. J., wrote dissenting opinion.

NOTE.—This was a rehearing of the preceding case. See note to *Commonwealth v. Warwick, post*; also note 2 at end of Part I.

THE STATE EX REL. NATIONAL SUBWAY COMPANY ET AL V. ST.
LOUIS ET AL.

Missouri Supreme Court, July 6, 1898.

(145 Mo. 551.)

SUBWAYS FOR ELECTRIC WIRES—MUNICIPAL POWER TO GRANT FRANCHISE—
RES JUDICATA—ULTRA VIRES.

The cases of *State v. Murphy*, 6 Am. Electl. Cas. 64, 77, are not *res judicata* upon the question of validity of municipal ordinances, in a proceeding in which the parties are not the same.

It is not *ultra vires* for a municipal corporation empowered by its charter to regulate the use of streets to enact an ordinance empowering a private corporation organized for public purposes, to occupy streets by subways and electrical apparatus, without requiring that all the public be permitted to use the subways, and without reserving to the municipal authorities the right of supervision or control.

Mandamus is the proper remedy to compel a municipal corporation to take action upon proposed plans and specifications for service and supply pipes to connect a given manhole in the subway with a specified building, pursuant to such ordinance.

Cases of this series cited in opinion: *Julia Bdg. Assn. v. Bell Teleph. Co.*, vol. 1, p. 801; *St. Louis v. W. U. Tel. Co.*, vol. 4, p. 102; *St. Louis v.*

State v. St. Louis.

W. U. Tel. Co., vol. 4, p. 115; *New Orleans v. Gt. So. Teleph. & Tel. Co.*, vol. 2, p. 122; *St. Louis v. Bell Teleph. Co.*, vol. 2, p. 44; *People v. Squire*, vol. 4, p. 123; *Reed v. W. U. Tel. Co.*, vol. 6, p. 791.

Boyle, Priest & Lehmann, S. H. King, and Jas. M. Lewis, for relators.

B. Schnurmacher and Chas. C. Allen, for respondents.

BURGESS, J.: This is a proceeding by mandamus to compel the city of St. Louis, and its board of public improvements, and the members of the board, to take action upon plans and specifications submitted by relators to said board on February 19, 1897, "for service and supply pipes connecting manholes in the subway constructed by virtue of the terms of ordinances Nos. 14,798 and 15,953, located at the southwest corner of Broadway and Olive streets, with areaway under the building and sidewalk located at said southwest corner of Broadway and Olive streets, and for a permit to do the work contemplated by the application.

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The National Subway Company of Missouri is a corporation duly incorporated and organized as such under and in accordance with the provisions of chapter 42, art. 5, of the Revised Statutes of Missouri, on the 28th day of January, 1889, for the purpose of acquiring, operating, and maintaining a line of underground magnetic telegraph in the city of St. Louis, Mo., and to lay out, construct, and maintain the necessary conduits, subways, ducts, and other necessary appurtenances for operating said underground magnetic telegraph, and connected therewith. By section 2721 of said article is provided that companies organized thereunder are authorized to set their wires and other fixtures along, across, or under any of the public roads, streets, and waters of this State, provided any company desiring to place its wires and other fixtures under ground in any city shall first obtain consent of such city through its municipal au-

thorities. Section 2724 of said article provides that any company so organized may construct, own, use, and maintain any line of telegraph or telephone, whether wholly within or wholly or partly beyond the limits of this State, and shall have power to lease or attach to the lines of such company other lines by lease or purchase, and may join with any other corporation or association in constructing, leasing, owning, using or maintaining their line or lines upon such terms as may be agreed upon, and may own any interest in such line or lines, or may become lessees thereof, upon such terms as the respective corporations may agree upon. The National Subway Company then applied to the municipal authorities of the city of St. Louis for "consent" to place its wires under the surface of the streets, as required by section 2721, *supra*, when the city, by its municipal assembly, by the enactment of ordinance No. 14,798, gave the desired consent. The ordinance is composed of ten sections, and is stated by relator to be as follows: "Section 1 grants to the National Subway Company, its successors and assigns, for a period of thirty-five years, permission to construct and operate conduits, etc., in any of the public highways, for the purpose of distributing and maintaining a line or lines of wires for the transmission of electricity for any and all purposes, upon condition that it submit to and secure the approval of the board of public improvements, detailed drawings and plans of work proposed to be done before doing it. Section 2 prescribes the manner in which the main conduit shall be laid, and as follows: (1) When in the streets and avenues, on a line parallel with the curb, and three feet distant therefrom, and at a depth of at least two feet below the surface; (2) when placed in the alleys, to be laid upon a line to be designated by the board of public improvements; (3) when put under the sidewalks, to be laid between the curb and a parallel line, and about five feet from the curb, and subject to the approval of the board of public improvements. Section 3 provides that the work shall be done

with the least possible delay and inconvenience to the public, and that the surface of the streets shall be restored to their condition before interruption, and so maintained for a period of twelve months. It also provides that if at any time the improvement, repairs, or the lowering of the grade of any street or alley, the laying of water pipe, construction of sewers or of any other public work, should require the taking up or removing or relaying of any pipes or appurtenances, such work shall be done by the grantee at its own cost. Section 4 requires a deposit of \$1,000 to be made and maintained, to be used by the street commissioner in doing such work as the grantee, being required to do, shall have failed to do, and provides, in addition, for penalty. Section 5 provides that (1) the grantee shall be a common carrier; shall permit any person or company to use its system of underground conduits upon such terms as they may agree upon; and, in the event of a disagreement, the price shall be fixed by arbitrators, and specifies the manner of their appointment. Section 6 provides, in addition to all other taxes, the grantee shall provide space in its subway for the fire, police alarm, and telephones wires of the city, free of charge, and to furnish the wire. Section 7 makes the grantee subject to the provisions of all ordinances then in force or thereafter enacted relating to excavations in streets, alleys, etc. Section 8 provides for a bond of \$25,000 to the city, and under what circumstances a new one may be required. It also provides that, unless the work of laying its conduits shall be begun within six months, the ordinance shall be void. Section 9 provides that this ordinance shall not be construed as an exclusive franchise, and that any breach of its conditions shall cause a forfeiture. Section 10 provides the terms and conditions upon which the city may acquire the system of conduits." On February 15, 1889, the city of St. Louis, through its municipal assembly, passed an amendment to the foregoing ordinance which is styled in these proceedings ordinance No. 15,953. This amendatory ordinance repeals sections 6 and 10 of the original ordinance, and amends sections 1, 4,

and 5. This ordinance eliminates sections 6 and 10 of ordinance 14,798, and substitutes for sections 1, 4, and 5 three other sections. No material change is made in section 1 by the amendment except to extend the duration of the franchise to fifty years, and to grant the right to distribute and maintain electric, telegraph, and other wires. No change of any consequence was made in section 4. By section 5, as amended, said company and its successors and assigns are declared to be a common carrier, and are required to pay to the city, for the rights and franchises granted, the sum of \$500 semi-annually, in advance. No provision is made for the use of the wires by the city, or the right of any other company or person to use them.

Under the circumstances stated, relators built under the surface of certain streets in the city of St. Louis a subway containing ducts wherein to place their wires, employed in carrying electric currents for telephonic, telegraphic, light, and heating purposes. These ducts serve the same purpose as poles erected upon the surface of the streets and alleys. In order that they may be accessible and afford electrical accommodations to buildings along the route of the tunnel, it is necessary to construct manholes, and in this way unite the buildings with it by means of lateral ducts. On February 19, 1897, relators applied to the board of public improvements of St. Louis, which have general and special jurisdiction of that matter, for the approval of plans and specifications then and therewith submitted, "for service and supply pipes connecting manhole in the subway constructed by virtue of the terms of said ordinances (Nos. 14,798 and 15,953), located at the southwest corner of Broadway and Olive street, with the areaway under the building and sidewalk located at said southwest corner of Broadway and Olive street," and for a permit to do the work contemplated by the application. The board refused to consider or pass upon or take any official action in respect of the application, and hence this petition for a mandamus to compel it to consider and pass upon the matter. Re-

lators charge that if not permitted to connect its wires, by tunnel in the streets, with buldings, its subway will be absolutely useless. The subway as constructed was built under the direction and with the approval of the board of public improvements, and at an outlay of over \$150,000; and the city collected semi-annually from the National Subway Company and its successors the \$500 stipulated to be paid in section 5 of the original ordinance as amended, and the \$1,000 required to be maintained by section 4, and now holds or has enjoyed the benefit of those sums. The city has received from these respondents, and now holds, six or seven thousand dollars as a compensation or tribute for the privilege granted by these ordinances. It is further conceded that the subways already constructed have been, and are now being, used by the Postal Telegraph Company (a telegraph company) for the housing and operation of its wires under a contract between it and the relators. Since the pleadings were made up the case has been dismissed as to the city of St. Louis.

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 II. It is contended by respondents, and so alleged in their return to the alternative writ, that the case of *State v. Murphy*, 134 Mo. 548, is an adjudication of the invalidity of ordinances 14,798 and 15,953, and is conclusive upon all the parties to this controversy and in this proceeding. That case was a proceeding by mandamus by the Underground Service Company,—a company organized under the provisions of chapter 42, art. 8, Rev. Stat. 1889, whose charter powers, as defined in its articles of association, were to “lay out and maintain, construct, and operate lines of subway in this State for the purpose of carrying wires for the transmission of electricity and electric currents; also, to lay out, construct, maintain, and operate lines of pipes, mains, and conductors in this State for the purpose of distributing substances, either for fuel or illuminating purposes, or for both,” etc.,—to compel Murphy, who was street commissioner, to grant to it a permit under section 568, art. 1, c. 15, of the

General Ordinances, to excavate Broadway street between St. Charles and Washington avenue. The relator had already procured the approval of the board of public improvements of its plans of constructing its subway along Broadway, as required by ordinance No. 14,798 and the amendment thereto. But after that a permit from the street commissioner was necessary, under the provisions of section 568 of the General Ordinances, which reads as follows: "No person shall make or cause to be made any excavation on any public street, highway, or alley without the written permission of the street commissioner so to do." This permit the street commissioner refused to give, and it was to compel him to perform that duty, under the General Ordinances, that the mandamus proceedings above referred to were inaugurated. It is contended by relators that ordinance No. 14,798 and its amendment were not directly in issue in that case; but in this contention we do not concur, as it was expressly held in that case, as we understand it, that ordinance 14,798 and ordinance 15,953 (which was amendatory thereof) were *ultra vires* of the city of St. Louis, and void. In the case of *Henry v. Woods*, 77 Mo. 277, it is said: "The fundamental rule upon this subject is that a matter once adjudicated by a court of competent jurisdiction may be invoked as an estoppel in any collateral suit, in any court of law or equity, or in admiralty, when the same parties or their privies, or one of the parties and the privy or privies of the other, allege anything contradictory to it; and those who assume a right to control or actively participate in the trial or its management, though not formal parties, will be concluded. *Stoddard v. Thompson*, 31 Iowa, 80; *Strong v. Insurance Co.*, 62 Mo. 289; *Wood v. Ensel*, 63 Mo. 193. The action, however, must be between the same parties as those in the former suit or their privies. Parties are "all persons having a right to control the proceedings, to make defense, to adduce or examine witnesses, and to appeal from the decision if an appeal lies." 1 Greenl. Ev. sec. 535. Privies are those who have mutual or successive relationship to the same

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right of property or subject-matter, such as "personal representatives, heirs, devisees, legatees, assignees, voluntary grantees, or judgment creditors or purchasers from them with notice of the fact." *Id.* sec. 189; Story, Eq. Jur. sec. 165; *Haley v. Bagley*, 37 Mo. 364; *State v. Johnson*, 123 Mo. 43. It is manifest that the parties to the two suits in question are not the same. Respondents were strangers to the first suit, and none of them were necessary parties thereto, or privy to any party to that suit. Nor does it appear that the respondents or any of them participated in the trial of that suit, or that they were in any way connected with its management. Our conclusion is that the judgment in that case was not *res judicata*.

III. The next question presented by this record is as to whether or not ordinance No. 14,798 is a valid contract as between the city of St. Louis and the National Subway Company of Missouri. Relator's contention is that the contract is a valid one, having been made in pursuance of the city charter; while respondents assert that the ordinance is *ultra vires* of the city, and the contract void. It may be conceded that, if the contract was a valid one when entered into by the enactment of that ordinance by the municipal assembly of the city of St. Louis and its acceptance by the National Subway Company, it is valid now, unless forfeited in some way; for no legislation by the city since the contract was entered into could in any way affect the rights of the subway company as to the terms of the contract, unless it consented thereto. The National Subway Company of Missouri was organized under the provisions of article 5, c. 42, Rev. St. Mo. 1889, entitled "Telegraph and Telephone Companies," for the purpose, as expressed in its charter, of constructing, owning, operating and maintaining a line of underground magnetic telegraph in the city of St. Louis, and to lay out, construct, and maintain the necessary conduits, subways, ducts and other appurtenances thereof and connected therewith. Section 2721 of the statute concerning telegraph and telephone companies provides as follows:

"Companies organized under the provisions of this article for the purpose of constructing and maintaining telephone or magnetic telegraph lines, are authorized to set their poles, piers, abutments, wires and other fixtures along, across, or under, any of the public roads, streets and waters of this State, in such manner as not to incommode the public in the use of such roads, streets and waters; provided, any telegraph or telephone company desiring to place their wires and other fixtures underground in any city, shall first obtain consent from said city through the municipal authorities thereof."

Section 2724 of the statute is as follows:

"Any company incorporated as herein provided, may construct, own, use and maintain any lines of telephone or magnetic telegraph, whether wholly within, or wholly or partially beyond, the limits of this State, and shall have power to lease or attach to the line or lines of such company, or other telephone or telegraph line by lease or purchase, and may join with any other corporation or association in constructing, leasing, owning, using or maintaining their line or lines upon such terms as may be agreed upon between the directors or managers of the respective corporations, and may own and hold any interest in such line or lines, or become lessees thereof, on such terms as the respective corporations may agree."

It will be seen from these two sections that telegraph and telephone companies organized under the article of the statute of which they form a part are given express powers to lay their wires underground in any city, by first obtaining its consent through the municipal authorities thereof. This, of course, implies the power to lay them in a proper manner, not inconsistent with the use of the streets as public thoroughfares, as well also as the power to lease its lines when laid to any other company, or to unite with any other company in constructing them. But, aside from the express powers thus conferred upon such companies organized under these two sections of the statute, it was held in *Julia Building Ass'n v. Bell Teleph. Co.*, 1 Am. Elect. Cas. 801, 88 Mo. 258, that the erection and maintenance of telephone poles on a street upon which wires are stretched, over which telephone messages are sent, is a proper use of the street. There can be no question as to the right of telegraph and telephone companies, under their charters, to occupy the streets of the city in constructing their lines of wires, and with the consent of the

city to lay them under the ground; and that the city has the power to permit and to enter into a contract with such companies by which they may be given the right to do so, and to grant its consent upon condition imposed, we think equally clear. The following authorities in effect so held:

In *St. Louis v. Western Union Tel. Co.*, 4 Am. Electl. Cas. 102, 149 U. S. 465, in speaking of the charter powers of the city of St. Louis over its streets, it is said: "In pursuance of these provisions of the constitution, a charter was prepared and adopted, and is therefore the organic law of the city of St. Louis; and the powers granted by it, so far as they are in harmony with the constitution and laws of the State, and have not been set aside by an act of the general assembly, are the powers vested in the city; and this charter is an organic act so defined in the constitution, and is to be construed as organic acts are construed. The city is, in a very just sense, an "*imperium in imperio*." Its powers are self-appointed and the reserve control existing in the general assembly does not take away this peculiar feature of its charter. . . . Obviously the intent and scope of this charter are to vest in the city a very large control over public property, and property devoted to public uses, within the territorial limits. It is given power to open and establish streets, to improve them as it sees fit, and to regulate their use, paying for all this out of its own funds. The word 'regulate' is one of broad import. It is the word used in the Federal constitution to define the powers of Congress over foreign and interstate commerce, and he who reads the many opinions of this court will perceive how broad and comprehensive it has been held to be. If the city gives a right to the use of the streets or public grounds, as it did by ordinance No. 11,604, it simply regulates the use when it prescribes the terms and conditions upon which they shall be used." In speaking of the same subject, Judge DILLON says: "Where under the general statutes of a State, a railroad was forbidden to construct and operate its road upon the streets of an incorporated city

without the assent of the corporate authorities, these are not limited to a simple granting or denial of the right of way, but may prescribe conditions on which they will give their assent; and, if these are accepted by the railroad company, they are binding upon the parties; and, accordingly, where the right of way along a street was granted by a city on condition that the company should build a depot in a certain part of a city, and grade, riprap, and pave the street it used, and the company agreed to accept it on these terms, it was held that it could not hold and enjoy the grant and not comply with the conditions on which it was made." Dill. Mun. Corp. (4th Ed.) sec. 706. So, in *St. Louis v. Western Union Tel. Co.*, 4 Am. Electl. Cas. 115, 148 U. S. 102, was said: "Again, it is said that by ordinance No. 11,604 the city contracted with defendant to permit the erection of its pipes in consideration of the right of the city to occupy and use the top cross-arm of any pole for its own telegraph purpose free of charge; and, in support of that proposition, the case of *City of New Orleans v. Great Southern Telephone & Telegraph Co.*, 2 Am. Electl. Cas. 122, 40 La. Ann. 41, is cited. But in that case it appeared that the telephone company had set its poles and constructed its lines under and by virtue of the grant made by the ordinance, and hence the conditions named therein were held part of the contract between the city and the telephone company, which the former was not at liberty to disregard."

The question then arises as to the nature of this power, whether governmental, public, or proprietary and private. It is said in *Illinois Trust & Sav. Bank v. City of Arkansas City*, 76 Fed. 282, that: "A city has two classes of powers,—the one legislative, public, governmental, in the exercise of which it is a sovereignty and governs its people; the other proprietary, quasi private, conferred upon it, not for the purpose of governing its people, but for the private advantage of the inhabitants of the city, and of the city itself as a legal personality. In the exercise of the powers of the former class, it is

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governed by the rule here invoked. In their exercise, it is ruling its people, and is bound to transmit its powers of government to its successive sets of officers, unimpaired. But, in the exercise of the powers of the latter class, it is controlled by no such rule, because it is acting and contracting for the private benefit of itself and its inhabitants, and it may exercise the business powers conferred upon it in the same way; and, in their exercise, it is to be governed by the same rules that govern a private individual or corporation. . . . In contracting for waterworks to supply itself and its inhabitants with water, the city is not exercising its governmental or legislative powers, but its business or proprietary powers. The purpose of such a contract is not to govern its inhabitants, but to obtain a private benefit for the city itself and its denizens." In *City of Quincy v. Buell*, 106 Ill. 337, by an ordinance of that city, one Prince was granted the exclusive right to construct, maintain, and operate waterworks in the city of Quincy for thirty years, and the exclusive right to sell water in the city for municipal and private purposes, and also granting to him the right to lay mains under the surface of the streets; and on a bill filed by Prince and others against the city and its chief of police, to restrain their interference with the laying of water pipes by the complainants in the streets of said city, the ordinance was sustained as a proper exercise of the proprietary right of the city. It seems from these authorities, and from reason as well, that the city of St. Louis, in granting to the Subway Company the right to lay its wires and construct its subway under the surface of the streets, acted in its proprietary capacity, and in pursuance of the powers conferred upon it by the provisions of its charter. And telegraph and telephone companies are authorized by section 2724, *supra*, to lease or attach to the line or lines of such company, or other telephone or telegraph lines, by lease or purchase, and to join with any other corporation or association in constructing, leasing, owning, using, or maintaining their lines, upon such terms as may be

agreed upon, which clearly authorizes one company to charge another rent, for the use of any part of its way or facilities. In *Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co.*, 101 Mo. 205, it is said: "The powers granted to and duties imposed upon the elevator company of themselves show that the property of the company is clothed with, and has attached to it, a public trust. Just like a railroad or a steamboat the property is private, and it is operated for private gain, but the use is public. It is true, the defendant is entitled to collect compensation for handling grain and other merchandise; and so may a railroad or steamboat establish rates and collect compensation for transporting persons and property. The wharf itself is not absolutely free, for the city has the right to make reasonable wharf charges, and so may the defendant make reasonable charges when performing wharf duties. But, it is said, the city has no control over the charges which defendant may make. If this elevator company has, as we hold, engaged to execute a public trust, then it is subject to public regulations, and the State may prescribe regulations even as to the charges. *Munn v. Illinois*, 94 U. S. 113. Whether the State has delegated power to the city to regulate charges is a matter of no consequence to the present inquiry. It is enough to know that the combined elevator and warehouse is erected and maintained to aid in carrying on business which has a public trust attached to it, and a business which may be properly conducted at and upon the wharf."

It must follow from what has been said that the city of St. Louis, having the control, as it does, over its streets, might, for the purpose of meeting the necessities of electric-using companies, set apart for them a part of its streets upon such terms and conditions as it might reasonably impose, without in any way misappropriating the street, or any part of it. The right to charge tolls, or to make an agreement with other companies for the use of its subway, are franchise rights, derived from the State alone, and with which the city has no concern. *St. Louis*

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v. Bell Teleph. Co., 2 Am. Electl. Cas. 44, 96 Mo. 629; *State v. East Fifth St. Ry. Co.*, 140 Mo. 539, 2 Dill. Mun. Corp. (4th Ed.) sec. 724. There is no ground for saying that an act of a municipal corporation is void because it does not exercise powers which it did not possess. Nor do we think the ordinance invalid because it did not reserve to the city control over the works. It is held in *People v. Squire*, 4 Am. Electl. Cas. 123, 107 N. Y. 593, that the right to exercise such powers is governmental, which cannot be alienated, and of which the city could not divest itself. Under this authority, the right to regulate the construction of the subway, and its use by the city, could at any time be regulated by it under its governmental and police powers, notwithstanding no such power was reserved in the ordinances.

The next question presented is, does the fact of the failure of the ordinance to provide for or hold the right of user by other companies render it invalid? Section 5 of the original ordinance provides that the National Subway Company shall be a common carrier, shall permit any person or company to use its system of underground conduits upon such terms as they may agree upon, and that, in the event of a disagreement, the price shall be fixed by arbitrators. As amended, said section provides that said company, and its successors and assigns are declared to be a common carrier, and are required to pay to the city, for the rights and franchises granted, the sum of \$500 annually in advance. No provision is made for the use of the wires by the city, or the right of any other company or person to use them. "According to the generally accepted definition, a common carrier is one who undertakes, for hire or reward, to carry from place to place the goods of those who choose to employ them." 6 Am. & Eng. Enc. Law (New Ed.) 237. The mere fact that the National Subway Company is declared by ordinance to be a "common carrier" does not make it so. It is the nature of its business by which its character is to be determined. Whatever may have been the law heretofore, it is now

generally held that telegraph companies are not common carriers. 6 Am. & Eng. Enc. Law (2d Ed.) 261, and authorities cited. See, also, *Reed v. Telegraph Co.*, 6 Am. Electl. Cas. 791, 135 Mo. 661, in which it is held that a telegraph company is not a common carrier. But it does not for that reason follow that the use of the National Subway Company is not a public one. The corporation is not a mere private one for personal gain only, but the business in which it is engaged is for the benefit of, and used for the benefit of, the general public, and in which many companies are now engaged all over the United States and elsewhere. The city may, by the exercise of its governmental powers, by ordinance require it to allow other companies engaged in a similar business to lay their wires in its subway; and, while not a common carrier, it is in some respects similar to one, in that messages are sent over wires in its conduit, instead of goods and personal property as by common carriers. No one will contend that telegraph and telephone companies are not public corporations, having the right to condemn property for public use (Lewis, Em. Dom. secs. 180, 241); and even if they are private corporations engaged in public uses and have power to condemn property for such purposes, as the National Subway Company was incorporated under the same statute, it logically follows that it possessed the same powers. "A use having been decided to be public, property devoted to it is liable to the regulation and control of the legislative authorities, as to the manner of such use, the rates to be charged, and in all respects necessary to protect the public against danger, injustice, and oppression." Foote & E. Incorp. Cos. 196. Again the same author says: "If a use is public, it extends its charter over all property necessarily associated with it, and indispensably incident to such use." Id. p. 196. From these considerations it logically follows that the use of the National Subway Company is a public one. It follows that *State v. Murphy*, 134 Mo. 548, should be overruled.

IV. The only remaining question is with respect to the removal.
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edy. "To entitle a party to a writ of mandamus, he must be possessed of a clear legal right to have exercised an office or a franchise, or to have a service performed by the party to whom he seeks to have the writ directed, and no legal specific remedy to which he can resort to compel the performance of this duty." 14 Am. & Eng. Enc. Law, 94, 95, and authorities cited. From the foregoing observations, it seems clear that the National Subway has a clear legal right to the relief sought, and no legal specific remedy therefor. We therefore order that a peremptory writ of mandamus issue, directed to the board of public improvements of the city of St. Louis, and each of the respondents herein commanding them to take action upon the application aforesaid, so addressed to them by the relator the St. Louis Underground Service Company, on February 19, 1897, for a permit to construct service and supply pipes connecting the man-hole in the construction as aforesaid, at the southwest corner of Broadway and Olive street, with the area-way under building and sidewalk located at said southwest corner of Broadway and Olive street, in order to connect subway so constructed under provisions of the above-named ordinances with the building located as aforesaid, provided the same be not injurious or harmful to the use of the public of said highway, and that said board of public improvements be commanded to grant such permits to the relators as may be necessary, and not injurious to the public use of its highways, to connect the subway so constructed with the buildings along the streets adjoining those in which said subway has already been constructed.

GANTT, C. J., and ROBINSON, WILLIAMS and BRACE, JJ., concur. MARSHALL, J., not sitting.

Sherwood, J., also wrote a concurring opinion.

NOTE.—See note to *Commonwealth v. Warwick*, *post*; also note 2 at end of Part I.

THE CITY OF ROCHESTER, Respondent, v. THE BELL TELEPHONE COMPANY OF BUFFALO, Appellant.

New York Supreme Court, Appellate Division, Fourth Department, May, 1900.

(52 App. Div. 6.)

TELEPHONE LINE—MUNICIPAL CONTROL—UNDERGROUND WIRES.

The right of a telephone company under the transportation law and the statutes preceding it, to maintain its appliances in city streets, is subject to the reasonable control of the city authorities by virtue of the general police power.

Unless the same is not possible or practicable, a telephone company may be required by a city to place its wires in a conduit constructed by another corporation pursuant to a contract with the city providing for rental of the use of the conduit to the city and to electric companies.

The question of fact as to the feasibility of obedience to such requirement by a telephone company will not be determined on affidavits used on a motion to vacate a preliminary injunction in an action brought by the city to restrain the telephone company from constructing an additional conduit.

Cases of this series cited in opinion: *Barhite v. Home Teleph. Co.*, vol. 7, p. 75; *People v. Metropolitan Teleph. Co.*, vol. 1, p. 604; *People v. Squire*, vol. 4, p. 123; *Am. Rapid Tel. Co. v. Hess*, vol. 3, p. 142.

'Appeal by defendant from order of Supreme Court, Munroe Special Term, denying motion to vacate injunction *pendente lite*.

John A. Barhite, for the appellant.

P. M. French, Corporation Counsel, for the respondent.

McLENNAN, J.: The action was begun on the 24th day of November, 1899, to obtain a judgment perpetually enjoining the defendant from constructing a conduit or subway in Oxford street in the city of Rochester, N. Y., in which to place its tele-

phone wires, and from in any manner interfering with said street for that purpose.

The complaint alleges in substance that the defendant is a domestic telephone corporation, engaged in the telephone business in the city of Rochester since the year 1880, under and in pursuance of the general laws of the State, and of a franchise or permission granted to it by said plaintiff; that on the 10th day of May, 1888, defendant and plaintiff entered into an agreement which provided, among other things, that the defendant, within a certain time, should place and maintain its wires, cables and conduits under ground in the streets of the city, in the places and in the manner designated by the executive board or common council of said city, and under its supervision, and that no conduit should be laid in any street unless determined upon by said executive board, and under its supervision and to its satisfaction. Said agreement also provided that its terms might be altered, amended, modified or revoked by the common council of said city at any time.

That by chapter 28 of the Laws of 1894 (Amdg. chap. 14 of the Laws of 1880, the revised charter of the city of Rochester) the common council was empowered to regulate and control the construction of all subways and conduits laid in the public streets. Thereafter, and on the 5th day of September, 1892, the plaintiff entered into an agreement with the Rochester Gas and Electric Company, a domestic corporation, by which it granted to it the right to construct and maintain subways and conduits in the streets of said city upon condition that it would lay sufficient ducts to accommodate the plaintiff and any and all other domestic corporations having the right to carry electric conductors under said streets, and that it would rent the use of the same to such other companies upon proper terms; that the said Rochester Gas and Electric Company laid and constructed a subway in Oxford street under said agreement, adequate to conveniently accommodate the wires of the defendant therein, and the defendant has the right to rent space in said subway for its purposes.

That thereafter, and on the 12th day of September, 1899, the common council of the plaintiff adopted a resolution requiring all persons and corporations having wires in Oxford street to place the same in the conduits constructed by the Rochester Gas and Electric Company. That the defendant refused to comply with the terms of such resolution, and entered upon and commenced excavating Oxford street for the purpose of constructing a subway therein solely for its own use.

The foregoing allegations of the complaint were supported by the affidavit of the then corporation counsel. Upon the summons, complaint and such affidavit an injunction order was granted *ex parte* by the county judge of Monroe county restraining the defendant from excavating in Oxford street or laying a conduit therein, and from in any manner interfering with said street for that purpose until the further order of the court.

Thereafter a motion was made by the defendant, at a Special Term of the Supreme Court, to vacate the injunction upon said complaint and affidavit, and upon a large number of other affidavits read in support of said motion, which affidavits stated and alleged, among other things, that it would be impracticable for the defendant to comply with the requirements of the resolution adopted by the common council for the reason, among others, that the conduit which said resolution required it to occupy with its wires contained wires charged with a powerful current of electricity, which would practically destroy the use of defendant's wires for its purpose.

The motion to vacate the injunction coming on to be heard, the plaintiff presented a large number of affidavits which controverted the principal facts stated in the moving affidavits, and alleged, among other things, that it was entirely feasible for the defendant to occupy with its wires the conduit or subway of the Rochester Gas and Electric Company in Oxford street, and that to construct and maintain another and independent conduit in said street would unnecessarily injure the property of abutting owners, and would seriously inconvenience the public.

There was also a conflict in the affidavits as to several other material facts relating to or bearing upon the rights of the respective parties. Upon all the facts the learned trial court at Special Term made an order denying the defendant's motion, and from such order this appeal is taken.

It does not appear, and it is nowhere alleged, that a speedy trial of the case may not be had, by which the disputed facts may be passed upon and determined in the ordinary way. Whether or not the temporary injunction should be vacated was, to some extent at least, addressed to the sound discretion of the court at Special Term, and, unless it is clear that such discretion was improperly exercised, it ought not to be interfered with by this court.

The defendant was incorporated pursuant to chapter 265 of the Laws of 1848, and the laws amendatory thereof and supplementary thereto. That act authorized a company so incorporated to construct lines of telegraph along and upon any of the public roads and highways within the State. By an amendment enacted by chap. 471, Laws of 1853, such a company was authorized to erect and construct the necessary fixtures for its telegraph lines *over or under* any of the public roads, streets and highways. The law was again amended by chapter 566 of the Laws of 1890 (the Transportation Corporations Law). Section 102 of that act provides that a telegraph or *telephone* company may erect, construct and maintain the necessary fixtures for its lines upon, *over or under* any of the public roads, streets and highways.

Under such legislative enactments the defendant had the right, independent of any permission granted by the plaintiff, to occupy Oxford street with the wires and appliances reasonably necessary for the proper conduct of its business. *Barhite v. Home Telephone Co.*, 7 Am. Electl. Cas. 75, 50 App. Div. 25.

It was held in the case of *People v. Metropolitan Telephone Co.*, 1 Am. Electl. Cas. 604, 31 Hun, 596, that, as authority

was given to the defendant by the legislature to construct and maintain such appliances as were necessary in the streets of the municipality for the proper conduct of its business, such occupation could not be held to be a nuisance or an unlawful obstruction of the streets.

Any obstruction of the highways which is authorized by the legislature cannot be held to be a nuisance; and the legislature may authorize an obstruction, where no private interest is involved, even to the extent of compelling the discontinuance of the use of a highway. *Delaware, L. & W. R. R. Co. v. City of Buffalo*, 65 Hun, 464.

While it is settled by authority that a telephone company, incorporated as was the defendant, has the right to use the public streets and highways of a city for its reasonable purposes, it is equally well settled that such use is subject to reasonable control, supervision and regulation by the authorities of the municipality in which such streets and highways are located, by virtue of and as a part of the general police power. *People ex rel. N. Y. Elec. Lines v. Squire*, 4 Am. Electl. Cas. 123, 107 N. Y. 593.

In that case the court says: "The primary and fundamental object of all public highways is to furnish a passageway for travelers in vehicles or on foot through the country. (Bouvier's Institutes, sec. 442.) They were originally designed for the use of travelers alone. But in the course of time, and in the interest of the general prosperity and comfort of the public, they have been put, especially in large cities, to numerous other uses; but such uses have always been held to be subordinate to the original design and use. . . . The due and orderly arrangement of the various and conflicting claims to privileges in the streets of large cities would seem imperatively to require the creation of a neutral board, with controlling authority to form a comprehensive plan by which these various enterprises may be harmonized and carried on without detriment to each other, and with due regard to the rights of the public. Such power is pre-eminently a police power, and it is within the legiti-

mate authority of a legislature to delegate its exercise to municipal corporations."

It was further held in that case that such police power and authority cannot be nullified or overridden by any chartered rights or franchises granted by municipalities.

In *Am. Rapid Tel. Co. v. Hess*, 3 Am. Electl. Cas. 142, 125 N. Y. 641, the plaintiff had erected its poles and strung its wires in certain streets in the city of New York. Pursuant to the provisions of the Subway Laws (so called) the plaintiff was given notice requiring it to remove its poles and place its wires in subways which had been constructed for that purpose. The plaintiff refused to comply with the request upon the ground that it had acquired vested rights under its contract with the municipality, which did not impose such burden upon it. The city authorities thereupon caused the poles of the plaintiff to be cut down and the wires to be removed. It was held that the action of the city in cutting down the poles and removing the wires of the plaintiff from the streets was justifiable, and an injunction restraining such action on its part was denied. In that case the court says: "The right of the plaintiff to maintain and operate its wires in the streets could certainly be no greater than the right of railroads, which by public authority occupy the streets and highways of the State. The State, in the exercise of its police power and the regulating control which it has over corporations created by its authority, may exercise a general supervision over such corporations. It may prescribe the location of the tracks, the size and character of the rails, the precautions which shall be taken for the protection of the public, and the character and style of highway crossings; and no one has ever questioned that it may do whatever is necessary and proper for the public welfare in the control and regulation of the franchises which such corporations have obtained by statutory authority."

In that case it was further held that the fact that a compliance with the requirements of the city authorities would be at-

tended with considerable expense, was no answer to the right of the public in pursuance of law to require the plaintiff to comply with the prescribed regulations.

In the case of *Barhite v. Home Telephone Co.*, *supra*, the court says: "When a corporation of this kind (telephone company) is to avail itself of the legislative grant, the manner of its exercise, the location of its poles, the stringing of its wires, etc., are within the control and regulation of the local legislative body. That is one of the police functions committed to the municipality."

The city of Rochester has no right to deny to the defendant the privilege of occupying Oxford street with its wires, but it has the authority to require that such privilege, however acquired, shall be exercised with due regard to the claims of others, and in such manner as to inconvenience and injure the general public as little as possible. *People ex rel. N. Y. Elec. Lines Co. v. Squire*, *supra*; *Barhite v. Home Telephone Co.*, *supra*.

In order to determine the rights of the parties to this action, it will be necessary to decide the conflicting questions of fact raised by their respective affidavits. If it should be found upon the trial of the action that it is impossible or impracticable for the defendant to occupy the conduit now in Oxford street because of the fact that it contains wires charged with powerful currents of electricity, or for any other reason, the plaintiff would have no right or authority to require the defendant to use such conduit, because such requirement would be a substantial denial of the right to exercise the privilege acquired by it under the legislative authority of the State. On the other hand, if it should be found, as claimed by the plaintiff, that the conduit of the Rochester Gas and Electric Company now in Oxford street is adequate and convenient, and in all respects proper for the use of the defendant, and that to permit it to construct and maintain another and independent conduit in said street would greatly and unnecessarily inconvenience the public, under its

police power the municipality would have the right to insist upon compliance with its request, and prevent the defendant from constructing an additional conduit in said street.

This question of fact and others almost equally important, which are the subject of dispute between the parties, should not be determined upon this motion or upon affidavits.

"The sole object of an interlocutory injunction is to preserve the subject in controversy in its then condition, and, without determining any questions of right, merely to prevent the further perpetration of wrong, or the doing of any act whereby the right in controversy may be materially injured or endangered." High Inj. sec. 4.

At section 5 the same author says: "It is to be constantly borne in mind that in granting temporary relief by interlocutory injunction, courts of equity in no manner anticipate the ultimate determination of the questions of right involved. They merely recognize that a sufficient case has been made out to warrant the preservation of the property or rights in issue *in statu quo* until a hearing upon the merits, without expressing, and indeed without having the means of forming an opinion as to such rights. And in order to sustain an injunction for the protection of property *pendente lite*, it is not necessary to decide in favor of complainant upon the merits, nor is it necessary that he should present such a case as will certainly entitle him to a decree upon the final hearing, since he may be entitled to an interlocutory injunction, although his right to the relief prayed may ultimately fail. Nor is the decision of the court in granting or refusing a preliminary injunction conclusive upon either the court or parties on the subsequent disposition of the cause by final decree."

In the case at bar the defendant conceded its intention, in case the injunction is vacated, to immediately enter upon, excavate the street in question and construct a conduit therein, all of which it is the sole purpose of this action to prevent; and it is apparent that if the defendant is now permitted to accomplish

such purpose, the plaintiff would practically be without redress, irrespective of the final result of the action. To vacate the injunction would in effect permit the defendant to accomplish its purpose, wholly irrespective of whether or not it is entitled to exercise the rights which it claims in Oxford street, upon the facts as they may be found upon the trial of this action, and so the rights of the parties would be practically settled by such a decision.

Without passing upon or determining any of the questions of fact raised by the affidavits of the respective parties, or indicating what rules of law may be applicable to the facts which may be found upon the trial, we are of the opinion that, under all the circumstances, the injunction should be retained until the decision of the action, and that the order appealed from should be affirmed.

All concurred, except Adams, P. J., not voting.

Order affirmed, with ten dollars costs and disbursements.

NOTE.—See note to next case; also note at end of Part I.

THE COMMONWEALTH OF PENNSYLVANIA EX REL. THE BELL
TELEPHONE COMPANY OF PHILADELPHIA V. CHARLES F.
WARWICK, MAYOR, ET AL.

Pennsylvania Supreme Court, May 2, 1898.

(185 Pa. 623.)

TELEPHONE—MUNICIPAL CONTROL—SUBWAYS AND TERMINAL POLES.

A telephone company having been by ordinance "authorized to run and maintain its wires over and through the streets of Philadelphia" for telephone purposes, upon a single condition, which it has observed, and has constructed its line pursuant to said permission, the councils have no power to impose further conditions.

Commonwealth v. Mayor.

Authority to run and maintain wires "over and through" streets does not include permission to run them under the streets; but the mode may be and was in the present instance changed by the concurrent act of city and company from the overhead to the underground system.

An ordinance directing a change of system necessarily authorizes the construction of the necessary conduits and other appliances; and if it make no provision for designation of streets therefor, the telephone companies may choose for themselves, save in exceptional cases.

The power of regulation of manner of occupation reserved by the city includes power to compel the adoption of reasonable and generally accepted means to avoid obstruction and danger to public travel.

The use of terminal poles in connection with underground conduits being the system previously adopted, the burden of showing that there is a better one, in general use and reasonable for adoption, is on the city.

Questions of conflict of authority and of pleading considered.

Appeal by respondents from judgment for relator upon a petition for a mandamus commanding the mayor, director of public safety and chief of the electric bureau to grant permits to erect terminal poles.

John Kinsey, City Solicitor, and *James Alcorn*, Assistant City Solicitor, for appellants.

John G. Johnson, for appellee.

MITCHELL, J.: The Bell Telephone Company, relator, claims the right, under the ordinance of 1879, granting permission to introduce its system into Philadelphia, to lay its wires under the streets, and to erect such terminal poles, etc., as it may deem necessary, subject only to the regulation of the use of the streets by general ordinances of councils. The respondents, on the other hand, on behalf of the city of Philadelphia, contend that the consent of councils must be specially obtained for each extension of the relator's conduits or wires, and the erection of each terminal pole. Neither of these opposing contentions can be sustained in its entirety. The basis of the relator's rights is the ordinance of December 24, 1879, by which it was "authorized to run and maintain its wires over and through the streets of the city of Philadelphia for the purpose of establishing tele-

phonic communication between its patrons and between its exchange office and the subscribers thereto." Except certain preliminaries, which were complied with, the only condition imposed by this ordinance was that the company should enter into a written obligation to comply with all the ordinances, then existing or thereafter passed "regulating or in any manner controlling telegraph or telephone companies in the use of the streets for telegraph and telephone purposes." The relator having accepted the obligation, and constructed its lines, it is clear that the power of the city to impose conditions upon its grant of consent was ended. Its authority thereafter was only that of regulation as to the use of the streets. The grant, however, of authority to run and maintain wires "over and through" the streets, did not include permission to lay them under, below, or beneath. "Over" and "through" are equivalent to "across" and "along," not only by the natural meaning of the words in this connection, but by the practical construction given to them at the time by the acts of the parties. The claims of the relator in this respect are too broad, and cannot be sustained. But by the ordinance of June 13, 1882, the relator, in common with all others except the city of Philadelphia itself, was directed to remove all poles and wires from the streets prior to January, 1885, and prohibited from erecting any others after that date. The object of this ordinance is admitted to have been the substitution of the underground for the overhead system. No question was raised by the telephone company as to the reasonableness of this ordinance as a regulation of the use of the streets, and it proceeded to construct and put in operation, in a considerable part of the city, its underground conduits and wires. By the concurrent act, therefore, of the city and the company, the mode of using the streets in the exercise of the latter's franchise has been changed from the overhead to the underground system. No other change was made, and the franchise remains the same in all other respects. The original grant of consent extended to all the streets of the city. There was no limitation then, and

there could be none imposed thereafter. The change to the new system was not made all at once, and the city, by ordinances, from time to time postponed the date for the removal of the poles, and finally suspended the operation of the ordinance of 1882 in that respect till further action of councils. Nor was it found practical, apparently, by the telephone company, to do away altogether with the use of poles; and in adopting its underground conduits it has used what have been called in this case "terminal poles," which, though much fewer in number than the old telegraph poles, are much larger, and more obstructive of the street. Permission for the location and construction of conduits and the erection of such poles has from time to time been granted by special ordinance, on application to councils, and licenses from the superintendent of the police and fire-alarm telegraph and later from the department of public safety. Question having been made, however, as to the issuance of such licenses, the mayor was of opinion that he might do so; but in January, 1897, he submitted the matter to councils, recommending the passage of a resolution giving express authority to the director of public safety. Councils, however, on February 4, 1897, passed, instead, a resolution directing the "departments of public works and safety . . . not to issue any permits for the construction of underground service or the erection of terminal poles unless the same has been duly authorized by ordinance of councils." Thereafter the director of public safety, deeming himself without power, refused to issue any further licenses, and hence the filing of this petition by the telephone company.

The ordinance of 1879, as already discussed, put no restriction on the streets or localities to be occupied by the telephone company; nor did the ordinance of 1882. The latter authorized, and in fact commanded, the replacement of the overhead by the underground system; and in so doing it necessarily authorized the construction of conduits, terminal poles, or any such appliances as are or may be reasonably necessary to make

the system effective. And the determination as to what streets should be occupied was no longer in councils, but in the telephone company, except possibly so far as any particular street might be so exceptionally situated as to take it out of the general rule. The ordinance, therefore, of January 12, 1888, and others of the like kind, granting permission to lay conduits in certain streets, were unnecessary, and, except so far as the provisions as to the manner of doing the work at night, etc., may be valid regulations, were inoperative. While the city, however, has parted with its power to designate the streets to be occupied, it has expressly retained the authority to regulate the manner of occupation. And this includes the power to compel the adoption from time to time of all reasonable and generally accepted improvements which tend to decrease the obstruction of the streets, or increase the safety or convenience of the public in their use. By the ordinance of January 6, 1881, "to regulate the erection and maintenance of telegraph poles" in the city of Philadelphia, any corporation or person authorized to erect telegraph poles was required to obtain a license from the superintendent of the police and fire-alarm telegraph, who was authorized to receive the applications, hear objections, and grant the license, with such conditions, etc., as the case should require, to secure the purposes of the ordinance. Under the Bullitt bill of 1885, the duties and authority of the superintendent of the police and fire-alarm telegraph passed to the department of public safety, which is now vested with the authority to issue licenses for telegraph poles, etc., under the ordinance of 1881, and with the general supervision of the subject. The power being administrative in its nature, and lodged in an executive department, cannot be controlled by councils, under the prohibition of the act of 1885, art. 16 (P. L. 54). The resolution of February 4, 1897, was therefore beyond the province of councils, and of no effect.

The judgment of the learned court below was in substantial accord with the principles so far discussed, but overlooked one

point, of at least technical importance. The case was heard on petition and answer, and the averments of the latter must be taken to be true. In paragraph 7 it is denied that terminal poles are a necessary part of the operation of the underground system; in paragraph 10 it is averred that the poles, if licensed at all, should be located by the electrical bureau with a view to the interests of the city and the property owners, and the convenience of the public; and in paragraph 13 it is averred that there is another system, which dispenses with terminal poles, already in use by another company, and which could be used by the relator. These averments raise question of fact, which the respondents are entitled to have determined before the issue of a peremptory mandamus. The ordinance of 1881 requires the applicant for a license to designate the places where the poles are to be erected, but gives the department authority to revise and modify the particulars before issuing the license. We presume this is all that is meant to be claimed by paragraph 10 of the answer, and, if so, it is clearly within the province of the department. The other matters, if insisted upon, may be more serious. As already said, the power of regulation includes the power to compel the adoption of reasonable and generally accepted devices which increase the safety and convenience of the public. The use of terminal poles being the system heretofore adopted, the burden of showing that there is a better one, in general acceptance, and reasonably adoptable by the telephone company, will be upon the city. Whether the director of public safety, in view of the expression in his letter of December 10, 1896, to the mayor, that, "in fact, with underground conduits, terminal poles are alone practicable," will be disposed to insist now on a different system, is for him to determine. The matter is largely within his discretion, and now that he is freed from the prohibition of the resolution of February 4, 1897, and restored to his proper control of the subject, we presume he can readily come to an agreement with the relator. But for the present the answer must stand, and raising an issue of fact

which must be disposed of before final judgment. Judgment reversed, and procendendo awarded.

NOTE.—While the nine cases preceding this note have been grouped together with reference to the fact that the question of underground conduits for electrical wires is discussed or is involved in each of them, the grouping is perhaps fanciful rather than useful, since the same rules apply for the most part to the use of streets for underground as for overhead wires. If any useful purpose is subserved by bringing these cases together it may be that of illustrating the rapidity with which the underground system has come into use within the past few years, as indicated by the number of cases which have come before the courts in which it is concerned. Only a few cases have appeared in earlier volumes of this series. See index to vols. 5 and 6, title "Underground Wires."

The following additional cases relate to underground conduits:

In *W. U. Tel. Co. v. Syracuse*, 24 Misc. 338 (N. Y. Supreme Court, Onondaga Special Term, July, 1898), held that a grant by a municipal corporation to a telegraph company of the right, not exclusive, to construct subways in streets, made upon consideration moving to the city, among others the providing of a portion of the subway for the exclusive use of the city, is a contract which the city has no right to impair, at least for the benefit of another private corporation; also, that the city having subsequently granted to an electric light company the right to place subways for its wires, and such subways having been located by the municipal authorities, and construction thereof begun, in such way as to interfere with the use of and access to its subways by the telegraph company, such location being unnecessary, held, that the telegraph company was entitled to an injunction against the electric light company and the city.

In *Matter of City of Geneva v. The Geneva Telephone Company*, 30 Misc. 236 (N. Y. Supreme Court, Monroe County Special Term, Jan., 1900), held that a provision of the charter of the city of Geneva (Laws 1897, ch. 390, amended L. 1899, ch. 405), which empowers the city to construct underground conduits, to compel the removal of electric wires from the streets to the conduits, and to compel the owners of the wires to help pay the expense of constructing the conduits, is not unconstitutional, but within the police power of the State which the legislature may confer upon a municipality, that in the construction of conduits for electric wires, municipal authorities must exercise their discretionary power in such way as to afford reasonable facilities and protection to a telephone company compelled to use them, that conduits having been properly constructed by the city, a telephone company will not be excused from removing its wires thereto by the fact that the city has made no rules regulating the use of

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the conduits by different electrical companies, it being assumed that suitable rules will be made, and that the municipal authorities having been clothed with the discretion to either construct conduits or compel the companies to construct their own, the exercise in good faith of that discretion by electing to construct conduits and refusing permission to a telephone company to do so, will not be interfered with.

CITY OF PHILADELPHIA V. ATLANTIC & PACIFIC TELEGRAPH COMPANY.

U. S. Circuit Court of Appeals, Third Circuit, May 25, 1900.

MUNICIPAL LICENSE FEE.—TELEGRAPH LINE IN STREETS.

Upon the question of whether or not a municipal license fee imposed upon a telegraph company is excessive, held proper to refuse a charge which asserts the right of the city to impose a fee in excess of the expense incurred on account of the poles and wires maintained in its streets. Evidence held sufficient to warrant direction of verdict for the municipality seeking to recover the license charges.

Cases of this series cited in opinion: *Allentown v. W. U. Tel. Co.*, vol. 4, p. 90; *Chester v. W. U. Tel. Co.*, vol. 4, p. 100; *Philadelphia v. Am. Un. Tel. Co.*, vol. 6, p. 85.

In error to the Circuit Court of the United States for the eastern district of Pennsylvania.

E. Spencer Miller, for plaintiff in error.

Silas W. Pettit, for defendant in error.

Before Acheson, Dallas and Gray, Circuit Judges.

ACHESON, Circuit Judge: This was an action brought by the city of Philadelphia against the Atlantic & Pacific Telegraph Company to recover license charges payable under ordinances of the city enacted January 6, 1881, and March 30, 1883, relat-

ing to the maintenance of poles and wires in the streets of the city. The charges imposed by these ordinances are one dollar per annum for each pole and \$2.50 per annum for each mile of telegraph or telephone wires strung overhead, and the charges are imposed upon all corporations, firms and individuals so using the streets. The underlying question here was before this court in the case of *City of Philadelphia v. W. U. Tel. Co.*, 32 C. C. A. 253, 89 Fed. 454, 461, in which the opinion of the court was delivered by Circuit Justice SHIRAS. It was recognized there as settled that a city may lawfully impose by ordinance such license charges, but subject to the limitation that whether the ordinance is reasonable in respect to the terms and amount of the charges can be judicially inquired into. It was, however, declared by the court that there is a presumption in favor of the validity of such city legislative action, and that the evidence to justify a contrary holding must be clear and convincing. It was there further said that, in determining the question of the validity of such ordinances, a wide latitude should be allowed in the introduction of evidence going beyond the expenses attending direct regulation and oversight; and it was specifically held that testimony to show increase in the force and apparatus of the fire department rendered necessary by the maintenance of such poles and wires is proper to be considered, as well as evidence that extra meetings of the councils were required for the purpose of regulating their erection and maintenance. This court there laid down, as governing this class of cases, these principles, namely:

“Not only is there a presumption in favor of the validity of the action of legislative body, but the facts upon which that action proceeds are so numerous, and so liable to frequent changes, courts should act cautiously in dealing with such a case, and admit evidence of all facts and circumstances that seem to bear even remotely upon the issue. As was said by the

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Supreme Court of Pennsylvania in *City of Allentown v. W. U. Tel. Co.*, 148 Pa. St. 119, 23 Atl. 1070, the amount of the license charges rests with the city councils in the first instance; and it is only when such discretion has been manifestly abused that the courts are justified in interfering."

Upon the trial of the present case the plaintiff put in evidence the ordinances in question, and the returns made by the defendant, showing the number of poles and miles of overhead wire it had maintained in the streets of the city during the years covered by the claim in suit and rested. Undoubtedly the plaintiff thus made out a *prima facie* case, under the ruling of this court referred to, and also under the decision of the Supreme Court of Pennsylvania in the cases of *W. U. Tel. Co. v. City of Philadelphia*, 12 Atl. 144; *City of Allentown v. W. U. Tel. Co.*, 4 Am. Electl. Cas. 90, 148 Pa. St. 117, 23 Atl. 1070; *Chester City v. Same*, 4 Am. Electl. Cas. 100, 154 Pa. St. 464, 25 Atl. 1134; *City of Philadelphia v. American Union Tel. Co.*, 6 Am. Electl. Cas. 85, 167 Pa. St. 406, 31 Atl. 628. The first and last of these State cases involved charges the same in kind and in amount as here, and the charges were sustained. To show that the license charges in question were unreasonable, and the ordinances therefore void, the defendant, in answer to plaintiff's *prima facie* case, introduced evidence tending to show that the supervision of poles and wires by the city was exercised through its electrical bureau only, and that, measured by the expenditures of that bureau of the city government, the license charges were excessive and unjust. In rebuttal the plaintiff introduced evidence showing that, because of the presence of poles and overhead wires in the streets, and to protect the public from perils incident thereto, the policemen were required to render, and did render, to a considerable extent, additional services, and thereby increased expense was incurred by the police bureau; that the work of extinguishing fires was seriously hindered by the suspended wires, and extra calls for fire engines thereby necessitated, thus imposing upon the fire bureau additional expense;

and that the city incurred expense by reason of necessary legislation by city councils in regulating and otherwise governing electric wires overhead in the streets of the city. To all this the defendant offered no counter proofs whatever, and the plaintiff's rebuttal evidence was not contradicted or impeached in any particular.

The jury, under the charge of the court, rendered a verdict, upon which judgment afterwards was entered, for \$3,375.35, which is about one-half of the claim in suit. No complaint is here made in respect to the general charge of the court, but the city, the plaintiff in error, complains of the refusal of the court to affirm certain of its points or prayers for instruction, and of the answers made by the court thereto. The assignments of error are:

"(1) In refusing plaintiff's first point for charge, which was as follows: 'The jury must find for the plaintiff.'

"(2) The learned judge erred in refusing plaintiff's second point for charge, which was as follows: 'If the jury find that the ordinance in question in this case may be considered reasonably as having been passed with a view to coercing the companies to place their wires underground, rather than maintain them overhead, in the streets of the city, then the jury must find for the plaintiff in this case for the full amount of its claims, even if the aggregate of the charges imposed is greater than all the expenses incurred by the municipality because of the presence of the poles and wires.'

"(3) The learned judge erred in refusing plaintiff's fourth point for charge, which was as follows: 'The jury must find for plaintiff for the full amount of its claim.'

"(4) The learned judge erred in refusing plaintiff's sixth point for charge and in answering the same as follows. Point. 'If the jury believe the testimony offered on behalf of the city to the effect that the police bureau, the fire bureau, and other branches of the city government in addition to the electrical bureau, incur expense as a natural consequence of the presence

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of the poles and electrical wires overhead in the streets of the city, they must find for the plaintiff in the full amount of its claim. There has been no evidence upon which the jury could find that the increased expenditures by the city for those branches of the government, on account of the extra expense due for the presence of poles and wires, is not sufficient to justify the amounts of the charges.' Answer. 'I refuse the sixth point because it asks the court to decide on the effect of the evidence. It is for the jury, and not for the court, to determine whether the license charge is unreasonable, under all the evidence.'

"(5) The learned judge erred in refusing plaintiff's seventh point for charge, and in answering the same, as follows: Point. 'It is of little importance in this case that the wires of other companies than the Western Union Telegraph Companies are generally at fault for the defects occurring among overhead wires, even if the jury find that this is the case, and that the wires of the Atlantic & Pacific Company have not been the origin of any trouble. The city of Philadelphia is justified in imposing a general charge upon all companies maintaining poles and overhead wires, to repay the aggregate charges which the city may be at because of the general expenses imposed upon it by the presence of all such poles and wires.' Answer. 'I refuse the seventh point as a whole. The scope of the instruction asked is too broad, especially in the second sentence.'

"(6) The court erred in not affirming and in answering as follows plaintiff's eighth point for charge: Point. 'The cost to the Western Union Telegraph Company of such work as the company may be in the habit of doing, upon its poles and wires throughout the district in which Philadelphia is situated, or throughout the city of Philadelphia, has little bearing upon the question of the proper amount of license charges to be imposed by the city. If the jury find that the city authorities do provide for the patrolling of the street, the proper charges therefor cannot be gauged by the cost to the company of repairing its wires on notice of defects having occurred. Answer. 'I answer that

as follows: The cost of inspection, whether by the company or by the city, is one item to be considered by the jury, and the jury must decide what weight should be given to the evidence upon this subject.' "

Before taking up the first, third, and fourth assignments, which go to the root of the case, we will briefly consider the other assignments. We are not prepared to say that the court erred in refusing the plaintiff's second point. That proposition, it will be perceived, does not touch the right of the city, by direct legislation, to compel all private persons and corporations to place their wires underground, but asserts the right of the city to impose license charges in excess of all the expenses incurred by the municipality because of the presence of poles and overhead wires in the streets, although they are lawfully there. We are not convinced that the decisions cited in support of this assignment are applicable here. At any rate, in disposing of this case it is our purpose to follow and keep within the principles laid down by this court in the case of *City of Philadelphia v. W. U. Tel. Co.*, *supra*. The plaintiff's seventh and eighth points, we think, are within those principles, and should have been affirmed. The license charges must be uniform as to all such users of the streets, and fixed with reference to the general aggregate amount of expenses to the city resulting from the presence of all the poles and overhead wires; and we are not able to see that the charges by the city for patrolling the streets are to be measured by the cost to the defendant of repairing its wires on notice of defects having occurred.

The first, third, and fourth assignments may be considered together. The plaintiff's sixth point, as we have seen, requested an instruction to the effect that if the jury believed the evidence introduced by the plaintiff that the police bureau and fire bureau, and other branches of the city government besides the electrical bureau, incurred expenses as a natural consequence of the presence of poles and electrical overhead wires in the streets of the city, the verdict should be for the plaintiff for the full

amount of the claim; the point adding, as ground for such instruction, that there was no evidence in the case upon which the jury could find that the increased expenditures by the city for those branches of the government on account of the extra expense due to the presence of poles and wires is not sufficient to justify the amounts of the charges. There was abundant evidence to warrant the presentation of this point, and we think it should have been affirmed. The defendant's case rested wholly upon its alleged showing that, measured by the services and expenses of the electrical bureau only, the license charges were excessive. The evidence as to the services rendered and the expenses incurred by other branches of the city government because of the presence of the poles and suspended wires came, indeed, from the plaintiff in rebuttal. It was, however, uncontradicted, and therefore the jury was not at liberty to disregard it. The burden of proof here was upon the defendant from first to last. It must be borne in mind that a strong presumption exists in favor of the validity of these ordinances. To quote the language of Judge SHIRAS, in speaking for this court in the former case:

"The amount of the license charges rests with the city councils in the first instance, and it is only where such discretion has been manifestly abused that the courts are justified in interfering."

Having regard to the entire evidence, it cannot, we think, be affirmed that in the passage of the ordinance in question there was manifest abuse of legislative discretion by the city councils. The evidence here did not warrant such a finding by the jury. These views, of course, require us to say, not only that the court should have affirmed the plaintiff's sixth point but also the plaintiff's first and fourth points.

It is no small satisfaction to us that our conclusion is in harmony with the views of the Supreme Court of Pennsylvania as expressed in the cases above cited. Although the decisions there may be conclusive upon us, yet agreement between the Federal and State courts upon such a question as that involved

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here is most desirable. *Burgess v. Seligman*, 107 U. S. 20, 34, 2 Sup. Ct. 10, 27 L. Ed. 359; *O'Brien v. Wheelock*, 37 C. C. A. 309, 95 Fed. 883.

The judgment of the Circuit Court is reversed, and the case is remanded to that court, with directions to award a new trial.

NOTE.—For other cases, besides this, and the next preceding and following it, upon the right of municipal corporations to impose license fees, see titles, "License Fee" and "Municipal Control," in indices to prior volumes of this series; also title "Notes," in said indices.

NOTE 1.—The following cases upon the general subject of Part I are in addition to the twenty-six above reported in full:

In *Home Teleph. Co. of New Brunswick v. Common Council of New Brunswick*, 62 N. J. L. 172, June 13, 1898, *held*, that a statute imposing upon a municipality the duty of designating streets and highways, for telegraph and telephone lines, exists only for lines running through the municipality, not for local lines.

In *United States ex rel. Mutual District Messenger Company v. Wight*, 15 D. C. App. Cas. 467 (Dec. 5, 1899), *held*, that mandamus will not lie at suit of an electrical company to compel street commissioners to grant permission to string wires over sidewalks; that the matter is discretionary with the commissioners.

In *State Consol. Traction Co., pros., v. East Orange Township*, 61 N. J. L. 202, Nov., 1897, a township committee ordinance "to regulate the running of electric wires in the township" provided that no person should trim, cut or break a tree in a highway without the permission of the township committee was held to be a valid and reasonable exercise of the police power; and such power is not divested by an agreement of the committee to allow an electric street railway company to operate in the streets.

In *People's Telegraph and Telephone Co. v. President, &c., of Berks, &c., Turnpike Co.*, Penna. Sup. Ct., May 27, 1901 (49 Atl. Rep. 284), *held*, that a telephone company is a telegraph company, and a turnpike is a highway, within the meaning of a statute providing that telegraph companies incorporated thereunder might construct their lines along any highway.

In *Phillipsburg Electric Lighting, Heating & Power Co. v. Inhabitants of Town of Phillipsburg*, N. J. Sup. Ct., June 10, 1901 (49 Atl. 445), the following is quoted from the syllabus: "A common council cannot repeal an ordinance granting permission to an electric light company to plant its poles and stretch its wires in all the streets and alleys of the town, when the company has conformed to the conditions of the ordinance so far as

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required, and has expended money in placing the poles and wires in certain of the streets, notwithstanding the common council may have been misled in passing the ordinance "

In *City of Zanesville v. Zanesville Teleph. & Tel. Co.*, Ohio Supreme Court, Oct. 18, 1900 (59 N. E. Rep. 109), *held*, that section 3461 of the Ohio Revised Statutes, requiring Probate Courts to direct the mode in which a telegraph or telephone company may use the streets and alleys of a city or village, when the municipal authorities and the company are unable to agree, is legislative, and not judicial, in character, and is therefore unconstitutional.

A later decision in the same case is reported 59 N. E. 781.

In *Nebraska Telephone Company v. Cornell*, Nebraska Supreme Court, March 7, 1900 (22 N. W. Rep. 1), *held*, that the statutes of 1887 and 1897, creating the State board of transportation, and defining its powers, including the regulation of telephone rentals and express, telegraph and telephone charges, are not unconstitutional.

In *Toledo v. W. U. Tel. Co.* (C. C. A., Sixth Circuit), 52 L. R. A. 730, *held*, that a telegraph company given the right by an act of Congress to occupy post roads with its poles and wires does not acquire such right free from the power of a municipal corporation to regulate the use of its streets, but must submit to local regulations for obtaining permission to string wires in public streets.

In *Point Pleasant Electric Light & Power Co. v. Borough of Bay Head* (New Jersey Court of Chancery, July 29, 1901), *held*, that electric light companies have authority to maintain poles and wires in the public highways upon first obtaining the consent of the owners of the soil; that a statute declaring that no poles shall be erected in any city or town, without a designation first obtained, does not extend to boroughs; and that an act empowering borough councils by ordinance to regulate streets remove obstructions and prescribe the manner in which privileges to use streets shall be exercised, confers a power which can be exercised only by ordinance; so that, until the passage of such ordinance, an electric light company which has obtained the consent of the owners of the soil may string its wires in the streets of the borough, which will be restrained by injunction from cutting wires so strung.

In *People ex rel. The Monticello Telephone Co., Relator, v. The Board of Trustees of the Village of Monticello*, N. Y. Supreme Court, Sullivan Trial Term, August, 1901 (35 Misc. 675), the following is quoted from the head note:

"Notwithstanding the fact that the Transportation Corporations Law gives a telephone company a franchise, direct from the Legislature, to use the public streets for constructing and maintaining its lines, the Village Law gives village trustees power to regulate the erection of the poles and the stringing of the wires, and as this latter power involves discretion, the Supreme Court, while able to compel its exercise in a proper case, cannot by mandamus control the particular method of the exercise."

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Where it appeared that village trustees had materially embarrassed or prevented a telephone company in its legal right to use the village streets and had long delayed passing any ordinance in the matter, the court refused to grant the company, in the first instance, a peremptory writ of mandamus requiring the trustees to grant it a permit to erect poles, string wires and conduct business in the village, but gave it leave to renew the motion on other papers if the passage of such an ordinance should be unduly delayed.

In *Electric Power Co. v. Mayor of New York et al.*, N. Y. Supreme Court, Appellate Division, Second Department, Jan., 1899, 36 App. Div. 383, a corporation empowered by the board of electrical control of New York City to erect and maintain wires, poles, pipes and other fixtures in the streets, subject to the conditions that until further order the privilege should be granted only through subways of a specified company, strung its wires across streets, some being fastened to house tops and others to poles in the streets. The commissioner of public works, by direction of the board of electrical control and other city authorities, cut down and took possession of the wire. In an action brought to recover the value of the wire, *held*, that the dismissal of the complaint was error. *Electric Power Company v. Met. Teleph. & Tel. Co.*, 4 Am. Electl. Cas. 649, affirmed on same opinion, 148 N. Y. 746, followed.

In the same case, New York Special Term, Sept., 1899 (29 Misc. 48), it appeared that a resolution of a city board of electrical control, permitting erection and maintenance of wires, poles, pipes and other electrical fixtures in and under streets, provided that until further order the conductors should be laid only through subways of another corporation. *Held*, in view of the policy of the State that electric wires in cities should be placed underground to authorize putting wires in subways only; also *held*, that the city had the right to remove overhead wires placed without further permission, but was liable for taking and selling the wire, as for conversion.

In *Southern Bell Teleph. & Telegraph Co. v. Stewart, Tax Collector*, 109 Ga. 80 (Jan. 30, 1900), *held*, that a tax of \$1 for each telephone station or box imposed by statute upon telephone companies was an occupation or business tax and not a tax on property.

In *Borough of North Braddock v. Central District Printing & Telegraph Co.*, 11 Pa. Super. Ct. Rep. 24; and *Kittaning Electric Light, H. & P. Co. v. Kittaning Borough*, *id.* 31, *held*, that boroughs may impose license tax upon poles and wires of electric light companies in the exercise of their police powers; and that the amount fixed by them will be altered by the court only in case of clear abuse of discretion.

In *City of Saginaw v. Swift Electric Lighting Company*, Michigan Supreme Court, July 13, 1897 (71 N. W. Rep. 6), *held*, that an ordinance of a city charging an electric light company with 50 cents per annum for each pole maintained by it, to cover the cost of inspection by the city, is unreasonable, where the actual cost of such inspection is 5 cents per pole.

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In *Ogden City v. Crossman & Rocky Mt. Bell Telephone Co.*, 17 Utah, 66 (June 29, 1898), *held*, that a municipality has power, by statute and constitution, for the purpose of raising revenue, to provide by ordinance for levying and collecting a license fee of five dollars for each telephone instrument operated and maintained by a telephone company, and used exclusively within the limits of the city, for which a rental charge is made, for local business; but such power does not extend to authorizing the city to license or tax interstate business of the company.

In *Postal Tel. Cable Co. v. Richmond*, 37 S. E. Rep. 789, Virginia Supreme Court of Appeals, Jan. 17, 1901, *held*, that a city ordinance imposing a license tax upon a corporation engaged in interstate commerce, e. g., a foreign telegraph company which has accepted the conditions and privileges of the Post-roads Act of Congress of July 24, 1866, not confined to business done exclusively within the city and State, but reciting that it is in place of an *ad valorem* tax on the company's property in the city, but exceeding in amount what could be levied under the City Tax Law, and making the payment of the license fee a condition precedent to the company's right to do business in the city, is void as a State regulation of interstate commerce.

NOTE 2.—The power of municipal authorities to regulate the maintenance in streets and highways, of poles, wires and other structures, and under the streets, of subways, for electrical purposes, is conferred by varying statutes. In general, however, it may be remarked that one right is everywhere recognized, namely, the exercise by municipal governments of the police power, to the extent necessary for the public health, safety and convenience. See *Mut. Un. Tel. Co. v. Chicago*, 1 Am. Electl. Cas. 506; *Tuttle v. Brush Elec. Illum. Co.*, 1 Am. Electl. Cas. 508; *W. U. Tel. Co. v. Champlain Elec. Co.*, 1 id. 822; *Allentown v. W. U. Tel. Co.*, 4 id. 90; *Consolidated Elec. Lt. Co. v. Peoples' Elec. Lt. & Gas. Co.*, 1 id. 250.

In *Marshfield v. Wisconsin Teleph. Co.*, *ante*, p. 103; *Utica v. Utica Teleph. Co.*, *ante*, p. 67, and *Rochester v. Bell Teleph. Co. of Buffalo*, *ante*, p. 211, it is expressly *held*, that the right conferred by statute upon telephone companies to maintain their structures in the streets of municipal corporations is subject to the police power; and in *State v. St. Louis*, *ante*, p. 195, that the reservation of the police power is implied and need not be specified in an ordinance authorizing the construction of subways by private corporations. In *Michigan Teleph. Co. v. Charlotte*, *ante*, p. 52, *held*, that the privileges of the Post-roads Act of Congress, also any contract of a municipality with a telephone company for the erection of poles and wires in highways, are subject to the police power. In *Rochester v. Bell Teleph. Co.*, *ante*, p. 211, and *N. W. Teleph. Exchange Co. v. Minneapolis*, *ante*, p. 168, *held* that the police power warrants a city in compelling the burying of wires.

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Though the courts may compel municipal authorities to make necessary rules, or to designate places for the erection of poles or other electrical appliances in streets, they will not usurp the power of the municipality and make the designation or rule themselves. *Marshfield v. Wisconsin Teleph. Co.*, ante, p. 103; *State v. Bound Brook*, ante, p. 65; *Michigan Teleph. Co. v. St. Joseph*, ante, p. 1.

In some States the statute authorizing the use of streets for electrical appliances makes municipal consent a prerequisite. Thus Virginia (*Southern Bell Teleph. Co. v. Richmond*, ante, p. 83), and Washington (*Spokane, & Co. Teleph. Co. v. Spokane*). In other States only the police power is reserved; for example, New York (*Barhite v. Home Teleph. Co.*, ante, p. 75), Michigan (*Michigan Teleph. Co. v. Benton Harbor*, ante, p. 9), Wisconsin (*Wisconsin Teleph. Co. v. Sheboygan*, ante, p. 109), Minnesota (*N. W. Teleph. Exch. Co. v. Minneapolis*, ante, p. 168).

Whatever the extent of the power reserved to the municipality, permission once given and acted upon, or given upon consideration, can be revoked only upon the ground of public necessity and by virtue of the police power. *N. O. v. Gt. So. Teleph. & Tel. Co.*, 2 Am. Electl. Cas. 123; *State, Hudson Teleph. Co. Pros. v. Jersey City*, 2 id. 133; *Rutland Elec. Lt. Co. v. Marble City Elec. Lt. Co.*, 4 id. 256; *Suburban Elec. Ry. Co. v. East Orange*, ante, p. 37; *W. U. Tel. Co. v. Syracuse*, ante, p. —; *Clarksburgh Elec. L. Co. v. Clarksburgh*, ante, p. 25; *Wyandotte Elec. L. Co. v. Wyandotte*, ante, p. 43; *C. & P. Teleph. Co. v. Baltimore*, ante, p. 151; *N. W. Teleph. Co. v. Minneapolis*, ante, p. 168; *Michigan Teleph. Co. v. St. Joseph*, ante, p. 1; *Pennsylvania v. Warwick*, ante, p. 219. In *Coverdale v. Edwards*, ante, p. 15, however, it is held that the legislature may authorize a city to reserve the right of revocation, in which case the company is a mere licensee.

Although under the New Jersey statute the designation of places by the city is a prerequisite to the erection of poles in the streets (*State v. Meyers*, ante, p. 49), still this does not affect the stringing of wires across streets from poles on private property. *Summit Township v. N. Y. & N. J. Teleph. Co.*, ante, p. 58. Neither (in New York) does permission to string wires across streets and along house-tops include the right to erect poles in the streets. *Utica v. Utica Teleph. Co.*, ante, p. 67.

PART II.

**THE MAINTENANCE OF APPLIANCES
FOR ELECTRICAL PURPOSES IN AND
UNDER STREETS AND HIGHWAYS CON-
SIDERED WITH SPECIAL REFERENCE
TO ABUTTING OWNERS' AND OTHER
PRIVATE RIGHTS.**

RUFUS MAGEE v. ELLSWORTH R. OVERSHINER.

Indiana Supreme Court, March 29, 1898.

(150 Ind. 127.)

TELEPHONE LINE NOT ADDITIONAL SERVITUDE.

The erection of telephone lines in city streets is not an additional servitude entitling the abutting owner to compensation, though he own the fee of the street.

An individual may be proprietor of a telephone system without legislative consent.

Cases of this series cited in opinion: *Lockhart v. Craig St. Ry. Co.*, vol. 3, p. 314; *Detroit City Ry. Co. v. Mills*, vol. 3, p. 333; *Julia Bdg. Ass'n v. Bell Teleph. Co.*, vol. 1, p. 801; *Cater v. N. W. Teleph. Exch. Co.*, vol. 5, p. 111; *Irwin v. Teleph. Co.*, vol. 1, p. 709; *People v. Eaton*, vol. 5, p. 87; *Pierce v. Drew*, vol. 1, p. 571; *York Teleph. Co. v. Keesey*, vol. 6, p. 107; *Board of Trade Tel. Co. v. Barnett*, vol. 1, p. 565; *Dusenbury v. Mutual Tel. Co.*, vol. 1, p. 448; *Met. Teleph. & Tel. Co. v. Colwell Lead Co.*, vol. 1, p. 662; *Broom v. N. Y. & N. J. Teleph. Co.*, vol. 2, p. 259; *Hewitt v. W. U. Tel. Co.*, vol. 2, p. 222; *Eels v. Am. Teleph. & Tel. Co.*, vol. 5, p. 92; *W. U. Tel. Co. v. Williams*, vol. 3, p. 184; *Pao. Postal Cable Co. v. Irwin*, vol. 4, p. 140; *Ches. & Pot. Teleph. Co. v. Mackenzie*, vol. 3, p. 196; *Chicago, &c., Ry. Co. v. Whiting, &c., Ry. Co.*, vol. 5, p. 236.

'Appeal from Circuit Court, Howard county; L. J. Kirkpatrick, Judge.

George W. Funk, D. H. Chase and Blackledge & Shirley, for appellant.

Goodykoontz & Ballard, for appellee.

HACKNEY, J.: Rufus Magee, the owner of a business property fronting upon one of the principal business streets of the city of Logansport, and the owner of the fee in the street, brought this suit for a mandatory injunction to cause the removal of a telephone pole placed by the appellee, Overshiner, in the curb line of the sidewalk in front of said property.

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The appellee, the owner of the telephone system in said city, placed said pole and strung wires upon the same in the night-time, after protest by the appellant, and without compensation to or consent from him. The principal question in the case is as to whether such use of the street is a servitude, not within the contemplated uses of a city street, and therefore, an additional burden upon the fee of the appellant, for which he should be compensated. The decisions of the courts of this country, so far from establishing a definite rule upon this question, are at such variance as to render hopeless any effort to reconcile them. At the threshold of our inquiries there are certain well-recognized propositions: The owner of the fee in a street which has been dedicated or condemned for a street is entitled to restrict its uses to such as are proper street uses, as stated by most of the decisions; to the uses contemplated at the dedication or condemnation. The public have only an easement for the proper uses of a street. When applied to new uses, the fee owner is entitled to compensation. When a use is by proper public authority, and is not an additional burden upon the fee, no compensation is due the fee owner. In the use of the public easement, there is no right to unreasonably burden the fee, to the special injury and damage of the fee owner. These general propositions, however, are of little service when we revert to the question: Is the telephone equipment an unnecessary or unreasonable obstruction, and a new and additional servitude? Will it suffice to say that because a street was dedicated or condemned fifty years ago, before electric inventions for lighting, communicating oral and telegraphic messages, and propelling street cars were thought of, it could not therefore have condemned or dedicated in contemplation of the uses therein of such inventions; or, that, because gas had not been used as a method of lighting, the right to lay pipes to conduct the gas could not have been contemplated; or that because water, for protection against fire, had not been forced through pipes in the streets, such use could not have been contemplated; and so on as to the uses of the street for

sewerage, for natural gas piping, for telegraph or telephone lines, above or below the surface of the street, or for the possible future uses of pneumatic tubes for the transmission of mails or parcels, and the distribution of steam or electricity for heating, etc. ? If what was actually contemplated at the time of the dedication should be found to answer the question in every case, many of the uses common to the streets of every city would be additional servitudes, for which the fee owner would be entitled to compensation.

It must be, however, that the contemplated uses should be deemed to have been, not only in the walking, riding upon horse-back and in wagons or other vehicles drawn by animals, in the going and returning upon business, social, religious or political missions, but also by such methods of travel and communication, in addition or in substitution for those, as might come into vogue and be accepted and recognized as proper and important uses of the street in the varying needs and demands of commerce, and the relations of man to man socially and otherwise. If this were not true, the way originally dedicated for a suburban highway, but by the growth of population becoming a city street, or the dedication of a village or town street afterwards becoming the principal thoroughfare of a great city, would be limited to the uses in vogue at the time and suited to the country road or the village or town street; and the growth of population, the advancement of commerce, and the increase of inventions for the aid of mankind would be required to adjust themselves to the conditions existing at the time of the dedication, and with reference to the uses then actually contemplated. That a dedication or condemnation is deemed to comprehend uses not actually in the minds of the parties at the time is seen from the almost unvarying rule that the electric street railway systems are not a new use and an additional servitude, but are a new method of enjoying an old and ever existing use. *Eichels v. Railway Co.*, 78 Ind. 261; *Chicago & C. T. Ry. Co. v. Whiting H. & F. C. St. Ry. Co.*, 139 Ind.

297, 38 N. E. 604; *Lockhart v. Railway Co.*, 3 Am. Electl. Cas. 314 (Pa. Sup.), 21 Atl. 26; *Railway Co. v. Mills*, 3 Am. Electl. Cas. 333 (Mich.), 48 N. W. 1007. They carry the people by means of a propulsive force, which is a substitute for the horse or mule which formerly drew the cars. The horse car was accepted as a conveyance added to the numerous kinds of vehicles in use, and varying in the use of stationary tracks or railways. Poles and wires for electric lighting have been admitted as a proper use, on the ground that the streets are lighted, and their general uses thereby made safer and more expeditious. Incidentally, the same use has been employed for supplying light to public, business, and private houses. Sewers have been admitted as not constituting an additional servitude, because they afforded a means of drainage for the streets, although one use was in carrying the waste from buildings of the citizens. Gas mains and poles were admitted in like manner as electric lighting systems and for like uses. In none of these cases has the inquiry been as to whether the fee owner contemplated such uses, or whether they were in vogue at the time of the dedication. They were always deemed to constitute a beneficial use of the streets, as in some degree aiding in the means or opportunities for conducting the affairs of the inhabitants, and in facilitating the communication indispensable to such affairs. Some of the authorities, reaching the same conclusion, treat the uses of a street, arising from a dedication or condemnation, as expansive, not confined to uses already permitted, but as civilization advances, admitting new uses. Ang. & A. Corp. sec. 312; *Julia Bldg. Ass'n v. Bell Tel. Co.*, 1 Am. Electl. Cas. 801, 88 Mo. 258; *Cater v. Telephone Co.*, 5 Am. Electl. Cas. 111, 60 Minn. 539, 63 N. W. 111; *Railway Co. v. Mills*, *supra*. In *Cater v. Telephone Co.*, *supra*, it is said: "The question, then, is, what is the nature and extent of the public easement in a highway? If there is any one fact established in the history of society and of the law itself, it is that the mode of exercising this easement is expansive, developing and growing as civiliza-

tion advances. In the most primitive state of society the conception of a highway was merely a footpath; in a slightly more advanced state it included the idea of a way for pack animals,—constituting, respectively, the ‘iter,’ the ‘actus,’ and ‘via’ of the Romans. And thus the methods of using public highways expanded with the growth of civilization, until to-day our urban highways are devoted to a variety of uses not known in former times, and never dreamed of by the owners of the soil when the public easement was acquired. Hence it has become settled law that the easement is not limited to the particular methods of use in vogue when the easement was acquired, but includes all new and improved methods, the utility and general convenience of which may afterwards be discovered and developed in aid of the general purpose for which highways are designed. And it is not material that these new and improved methods of use were not contemplated by the owners of the land when the easement was acquired, and are more onerous to him than those then in use.” Judge ELLIOTT, in his work on Roads and Streets (page 529), quotes approvingly from Cooley’s Constitutional Limitations (page 556), as follows: “When land is taken or dedicated for a town street, it is unquestionably appropriated for all ordinary purposes of a town street; not merely the purposes to which such streets were formerly applied, but those demanded by new improvements and new wants. Among these purposes is the use for carriages which run on a grooved track; and the preparation of the streets in large cities for their use is not only a frequent necessity, which must be supposed to have been contemplated, but it is almost as much a matter of course as the grading and paving.” Upon this branch of our inquiries, we must conclude, therefore, upon both reason and authority, that the uses of streets prevailing at the time of the taking or dedication of a street are not the limits of the uses to which the public is entitled, and which the soil owner is deemed to have contemplated, but that such uses are to be enlarged to include all of the additional and improved methods of attaining the same objects

and enjoying the same privileges, not, however, to the denial or substantial impairment of the fee owner's use and enjoyment of his abutting property.

Is the telephone, with its necessary poles and wires, to be regarded as a new use so disconnected from the purposes and objects in actual and legal contemplation when our city streets were dedicated or condemned as to constitute an additional servitude? The telegraph equipment, in its occupancy of the highway or street and its uses, is the nearest parallel we have to that of the telephone system. They are both inventions for communication of electricity. The equipment occupying the streets is the same. Some authorities have attempted to distinguish between the uses contemplated of city streets and of suburban highways. This distinction was recognized by this court in *Kincaid v. Gas Co.*, 124 Ind. 579, 24 N. E. 1067, where this language was employed "There is an essential distinction between urban and suburban highways, and the rights of the abutters are much more limited in the case of urban streets than they are in the case of suburban ways. We note the distinction between the classes of public ways, and declare that the servitude in the one class is much broader than it is in the other." In *Elliott, Roads & S.*, p. 299, it is said: "There is an essential difference between urban and suburban servitudes. The owner of the dominant estate in an urban servitude has very much more authority and much greater rights than the owner of the dominant estate in a suburban servitude. The easement of the one is very much more comprehensive than of the other. It is doubtful whether of all of the servitudes, there is one so broad and comprehensive as that of a city in its streets." Again, the same author says, on page 307: "The easement in a city is so broad and exclusive as to leave very little, if any, private right of use in the owner of the servient estate."

If this doctrine is accepted,—and we think it must be,—the cases which hold that telegraph and telephone lines upon country highways are an additional servitude cannot be given much

weight in determining the question before us. However, those cases which hold that these uses of the suburban ways are not an additional servitude, if the reasoning is tenable, apply to cases of city streets with greater force than to those of country ways. *Cater v. Telephone Co.*, *supra*, is such a case. In addition to the pertinent quotation already made from that case, we quote the following: "We are not unmindful that private property cannot be taken for a public use without compensation, however important that public use is. We are not forgetful of the fact that care should be taken that, in the popular zeal for modern public improvements, the burden of furnishing these improvements should not be shifted from the public, and imposed upon any particular class of individuals. But viewing, as we do, highways as being designed as public avenues of travel, traffic, and communication, the use of which is not necessarily limited to travel and the transportation of property in moving vehicles, but extends as well to communication by the transmission of intelligence, it seems to us that such a use of a highway is within the general purpose for which highways are designed, and, within the limitations which we have suggested, does not impose an additional servitude upon the land; in short, that it is merely a newly discovered method of using the old public easement." Another case of the same character is that of *People v. Eaton*, 5 Am. Electl. Cas. 87 (Mich.), 29 N. W. 145. It was there said: "When these lands were taken or granted for public highways, they were not taken or granted for such use only as might then be expected to be made of them, by the common methods of travel then known, or for the transmission of intelligence by the only method then in use, but for such methods as the improvement of the country or the discoveries of future times might demand. . . . It would be a great calamity to the State if, in the development of the means of rapid travel and the transmission of intelligence by telegraph or telephone communication, parties engaged in such enterprises were compelled to take con-

demnation proceedings before a single track could be laid or a pole set." The latter proposition can be better appreciated by the supposition that in the city of Indianapolis a telephone company should be required to make legal condemnations as to the 20,000 or more properties fronting upon the streets of that city.

The cases of *Pierce v. Drew*, 1 Am. Electl. Cas. 571, 136 Mass. 75; *Telephone Co. v. Keesey*, 6 Am. Electl. Cas. 107, 5 Pa. Dist. R. 366, and *Julia Bldg. Ass'n v. Bell Tel. Co.*, *supra*, are directly in point in holding that the erection of telephone systems upon city streets is not an additional servitude for which the adjacent fee owner is entitled to damages, but that such use, being an improved method of transmitting intelligence, and a substitute for the messenger upon foot, on horseback, or by vehicle, is within the contemplated uses at the time of the dedication. In the last case cited, it was said: "These streets are required by the public to promote trade and facilitate communications in the daily transactions of business between the citizens of one part of the city and those of another, as well as to accommodate the public at large in these respects. If a citizen living or doing business at one end of Sixth street wishes to communicate with a citizen living and doing business on the other end, or at any intermediate point, he is entitled to use the street, either on foot, on horseback, or in a carriage or other vehicle in bearing his message. The defendants in this case propose to use the street by making the telephone poles and wires the messenger to bear such communication instantaneously, and with more dispatch than in any of the above methods or any other known method of bearing oral communications. Not only would such communications be borne with more dispatch, but, to the extent of the number of communications daily transmitted by it, the street would be relieved of that number of footmen, horsemen, and carriages. If a thousand messages were daily transmitted by means of telephone poles, wires, and other appliances used in telephoning, the street through these means would serve the

same purpose which would otherwise require its use either by a thousand footmen, horsemen, or carriages to effectuate the same purpose. In this view of it, the erection of telephone poles and wires for transmission of oral messages, so far from imposing a new and additional servitude, would, to the extent of each message transmitted, relieve the street of a servitude or use by footman, horseman, or carriage." In the case of *Pierce v. Drew, supra*, a like reasoning is adopted. It is there said: "The discovery of the telegraph developed a new and valuable mode of communicating intelligence. Its use is certainly similar to, if not identical with, that public use of transmitting information for which the highway was originally taken, even if the means adopted are quite different from the post boy or the mail coach. It is a newly-discovered method of exercising the old public easement, and all appropriate methods must have been deemed to have been paid for when the road was laid out." In *Hershfield v. Telephone Co.* (Mont.), 29 Pac. 883, it was held that the telephone equipment was not a new and additional burden upon the fee in a city street; quoting with approval from *Julia Bldg. Ass'n v. Bell Tel. Co., supra*. It is true that it was further held that the fee in the street was not in the abutting owner, but the proposition is distinctly adopted that it is germane to the proper use of streets to allow the setting of poles and wires for the telephone. In *McCormick v. District of Columbia*, 4 Mackey, 396, the right of the telephone system to occupy the streets as a proper street use was held. The same right was recognized in *Irwin v. Telephone Co.*, 1 Am. Electl. Cas. 709, 37 La. Ann. 62; but it was placed upon the rule that the abutting owner could not complain, since the fee in the streets was in the public. We observe no means of distinguishing against the telephone equipment, on the ground that its poles are not in motion as are ordinary instruments of travel, since the permanent occupancy by the trolley poles, the gas and water pipes, etc., is maintained. See *People v. Eaton*, 5 Am. Electl. Cas. 87 (Mich.), 59 N. W. 145; *Telephone Co. v. Keesey, supra*.

If the existence of private benefit to the fee owner were the turning point between the admission of those things not instruments of travel or movement, as the fire cistern, the illuminating and heating gases, the water pipes, sewers, etc., and the telephone, it would be exceedingly difficult to establish the absence of private benefit to the property owner and business man in the employment of the telephone. Opposed to the view of the question as we have presented it are cited several authorities. *Stowers v. Telegraph-Cable Co.*, 68 Miss. 559, 9 South. 356, involved the right to place telegraph poles upon the sidewalk in the city of Vicksburg. The controlling portion of the opinion is as follows: "There is some conflict in the authorities, but the decided weight is to the effect that telegraph companies form no part of the equipment of a public street, but are foreign to its use, and that, where the abutting owner is the owner of the fee to the center of the street, he is entitled to additional compensation for the additional burden placed upon his land. Lewis, Em. Dom. § 131, citing *Telegraph Co. v. Barnett*, 1 Am. Electl. Cas. 565, 107 Ill. 507; *Dusenbury v. Telegraph Co.*, 1 Am. Electl. Cas. 448, 11 Abb. N. C. 440; *Metropolitan Telephone & Telegraph Co. v. Colwell Lea & Co.*, 1 Am. Electl. Cas. 662, 50 N. Y. Super. Ct. 488; *Broome v. Telegraph Co.*, 2 Am. Electl. Cas. 259, 42 N. J. Eq. 141, 7 Atl. 851; *contra*, *Hewett v. Telegraph Co.*, 2 Am. Electl. Cas. 222, 4 Mackey, 424; *Pierce v. Drew*, 1 Am. Electl. Cas. 571, 136 Mass. 75; *Julia Bldg. Ass'n v. Bell Tel. Co.*, 1 Am. Electl. Cas. 801, 88 Mo. 258." All of the cases cited by the court as in conflict with its opinion have been cited by us. Those cited in support of the opinion are by reference to Lewis on Eminent Domain, where the text is supported by the four cases first named by the court. Of those cases, *Telegraph Co. v. Barnett*, *supra*, involved the location of a telegraph pole in a rural highway, as did also *Dusenbury v. Telegraph Co.*, *supra*. In *Broome v. Telegraph Co.*, *supra*, the statute authorizing the establishment of the system required that the consent in writing of the prop-

erty owner, should be procured for the purpose, and without such consent the right was denied. The one case cited in the Stowers Case giving it any support was *Metropolitan Telephone & Telegraph Co. v. Colwell Lead Co.*, *supra*. That case broadly asserts that the telegraph service is not a street use. That conclusion is at variance with our conclusion.

Among the other cases cited by counsel for the appellant are *Eels v. Telegraph Co.*, 5 Am. Electl. Cas. 92 (N. Y. App.), 38 N. E. 202; *Telegraph Co. v. Williams*, 3 Am. Electl. Cas. 184, 86 Va. 696, 11 S. E. 106; *Cable Co. v. Irvine*, 4 Am. Electl. Cas. 196, 49 Fed. 113,—in each of which the question was as to the erection of telegraph poles upon a rural highway; and, if the distinction heretofore maintained is correct, they are not authorities in this case. In *Willis v. Telegraph Co.*, 37 Minn. 347, 34 N. W. 337, the judgment of the trial court, holding the telephone pole upon the city street an additional servitude, was affirmed upon a division of the court, and for the lack of a majority for either side of the question. It is therefore of little force as an authority. The only other decision, thought to be analogous, to which we have been cited, or which our extended researches have discovered, is that of *Telephone Co. v. Mackenzie*, 3 Am. Electl. Cas. 196, 74 Md. 36, 21 Atl. 690. In that case the complaint was held sufficient upon the general allegation that the pole planted in the footway in front of the plaintiff's warehouse "obstructs and prevents the comfortable and reasonable and beneficial enjoyment and use of said premises" without permission and without payment of compensation. It was held to present a cause of action for a direct interference with the use of the warehouse, and the question of the use of a street or a highway as an additional servitude was expressly held not to be involved. It was held, also, that the legislature had not and could not authorize the substantial impairment of such beneficial enjoyment of one's property. We do not therefore regard that case as in point. Nor do we regard the New York Elevated Steam Railway

Cases as in point. These cases correctly held, as we think, that the use of the street for such railway was an obstruction of the easements of access, light, and air, if not an unanticipated street use.

Text writers justly renowned have grouped many of the cases cited by us, and have variously expressed the opinion that the weight of authority forbids the use of an urban way for telephone equipment. We have found, however, no analysis of the cases, and no attempt by such writers to classify the cases applying to urban and suburban ways, and no effort has been made by them to consider the reasons supporting the cases which uphold the use as within the scope of proper street uses. As we have seen, there are but two decisions of authoritative force supporting the contention of the appellant. Those decisions involved the use of the telegraph equipment,—a use, as we have said, more nearly like that of the telephone than any other. The telegraph, however, has never been employed as a means of intraurban communication. It requires skilled persons to receive the messages, and then they are to be carried to the persons for whom they are intended by just such means and uses of the streets as would other written communications. The telephone is particularly useful in communications between the people within a city, and it can be used for that purpose directly, and by persons without special skill. It is more clearly a substitute for the old methods of the communication of messages between persons within the city than the telegraph.

We conclude that the reasonable use of the streets of a city for the equipment of a telephone system is not a new and additional servitude, for which the abutting property owner is entitled to compensation. Nor do we agree that the ordinary pole and wires are a special injury to the enjoyment of the abutting property. Nor do we agree with the appellant that a telephone system may not be owned and conducted by an indi-

vidual because of the grant, by the legislature, of such rights to corporations. An individual may conduct any proper business without legislative assent, unless there has been some legislative restrictions upon such right. If, in the present case, the appellant had been entitled to restrain the use because an additional servitude, the appellee could not have taken the use without an agreement with the appellant or some legislative power to condemn. That question is put at rest by the holding that there is no additional servitude in the erection of the pole. The judgment of the lower court is affirmed.

NOTE.—See Mr. Keasbey's note to *Nicoll v. N. Y. & N. J. Teleph. Co.*, *post*.

**MAURICE J. HALLERAN, Appellant, v. THE BELL TELEPHONE
COMPANY OF BUFFALO, Respondent.**

New York Supreme Court, Appellate Division, Fourth Dept., July, 1901.

(64 App. Div. 41.)

TELEPHONE LINE NOT ADDITIONAL SERVITUDE.

An abutting owner, owning no part of the fee in a street, cannot compel the removal of telephone poles from the highway, if they cause no substantial damage to any easement of light, air or access which he has in the highway.

Cases of this series cited in opinion: *Els v. American Teleph. & Tel. Co.*, vol. 5, p. 92; *Dusenbury v. Mutual Tel. Co.*, vol. 1, p. 448.

Appeal from judgment of Supreme Court, Genesee County, upon decision of court at Special Term.

Arthur E. Clark, for the appellant.

John G. Milburn, for the respondent.

RUMSEY, J.: This action was originally begun by Maurice

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Halleran, the plaintiff's ancestor, who was the owner of certain lands situate on a public highway in the county of Genessee, to compel the removal of certain telephone poles erected by the defendant in front of his lands. It is conceded that the plaintiff has no record title to the land to the center of the highway, but that the property to which he has title extends only to the side of the road. The highway is 100 feet wide and was laid out many years ago. The title to it so far as appears is in the Holland Land Company, which conveyed by deed to the defendant the right to erect its poles along the highway. It is found by the learned court below that the poles erected in front of the plaintiff's land have not caused any substantial damage to any easement of light, air and access which the owner of the land has in the highway. The learned court below dismissed the complaint. From the judgment entered upon his decision this appeal is taken.

We have examined this case with considerable care, not because in our judgment there is any difficulty in deciding the questions presented, but because we were advised by the counsel for the appellant that many other cases involving the same questions are pending in the courts, and we desire to settle, so far as this court may do so, the rules which are applicable to these cases.

The plaintiff, although admitting that he has no record title to the highway in front of his premises, insists that he has acquired title thereto by adverse possession. It appears that the plaintiff and his predecessors in title have from time to time as required by statute, cut down the weeds growing in the highway in front of his premises; that once in seven or eight years he has cultivated the land extending from the sides of the road out to the beaten track; sowed crops and seeded it, and has taken off the crops from time to time and cut the grass there growing. He has not in any way inclosed it, nor has his occupation of it been exclusive or interfered with the rights of passage of any one desirous of traveling upon the highway

clear up to his fence. Without, therefore, considering whether under any circumstances one can obtain an adverse title to a highway in front of his land, we think no adverse title has been acquired in this case, because as the plaintiff admits that there was no written instrument conveying title he could not have obtained title by adverse possession unless he had inclosed the land or customarily cultivated it (Code Civ. Proc. secs. 371, 372), and such cultivation must be notorious, hostile and exclusive, and unless the adverse possession has those qualities it is never effectual as the foundation of a claim of adverse title.

The case must, therefore, be disposed of in view of the fact that the plaintiff has no title whatever to the highway, and he has no other or different right to it than has any one of the public, except so far as being an abutting owner it is necessary for him to use the highway as a means of access to his premises. An encroachment which does not interfere with the right of passage over a highway gives no right to a citizen, who is not to some extent inconvenienced by it, to interfere with it. It certainly gives him no right to require its removal. If it constitutes a nuisance and interferes with the general right of the public, the public alone can compel its removal; but no private individual can interfere with it, except so far as it constitutes to him a private nuisance.

The finding is that the telephone poles do not interfere in any degree with any right which the plaintiff has as an abutting owner. When that fact was made to appear, we are utterly unable to conceive of any reason why the plaintiff should be entitled to maintain this action.

If the plaintiff were the owner of the land to the center of the highway, he would have his right of action either for damages caused by the erection of the poles and the cutting of his trees, or perhaps would be entitled to an injunction to compel the removal of the poles. *Eels v. American Telephone & Telegraph Co.*, 5 Am. Electl. Cas. 92, 143 N. Y. 133; *Dusenbury*

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v. Mutual Telegraph Co., 1 Am. Electl. Cas. 448, 11 Abb. N. C. 440.

It is unnecessary to say whether, in view of the small amount of damage suffered by the plaintiff, he could maintain an action to compel the removal of the poles, or whether he would be remitted to his action at law for damages or ejectment, but if he were the owner of the highway he would have some right of action, as is established by the cases just cited.

But in the present case, except so far as the erection of the poles has interfered with the plaintiff's right of access to his own land, he has not suffered any damage and he cannot maintain an action to compel the removal of the poles. For these reasons the judgment must be affirmed, with costs.

All concurred.

Judgment affirmed with costs.

NOTE.—See Mr. Keasbey's note to *Nicoll v. N. Y. & N. J. Teleph. Co.*, *post*.

OSCAR WYANT V. CENTRAL TELEPHONE COMPANY.

Michigan Supreme Court, February 20, 1900.

(123 Mich. 51.)

TELEPHONE LINE NO ADDITIONAL SERVITUDE.—INJURIES TO TREES.

The erection of a telephone line along a highway does not create an additional servitude upon abutting lands.

A telephone company which has been given the right to erect poles and wires has the right to remove branches of trees and other obstructions provided such removal be necessary and be accomplished in a proper manner.

Cases of this series cited in opinion: *Detroit City Ry. Co. v. Mills*, vol. 3, p. 333; *Dean v. Ry. Co.*, vol. 4, p. 172; *Tissot v. Gt. So. Tel. & Teleph. Co.*, vol. 2, p. 286; *Memphis Bell Teleph. Co. v. Hunt*, vol. 2, p. 252; *Mages v. Overshiner*, vol. 7, p. 241.

Appeal by defendant from a judgment of the Circuit Court of Berrien county in favor of plaintiff.

Howard, Roos & Howard, for appellant.

Charles E. White, for appellee.

HOOKEB, J.: The plaintiff commenced this action before a justice of the peace by summons, requiring it to answer a plea of trespass on the case. The declaration was trespass for breaking and entering plaintiff's close, and cutting and trimming trees growing in the close and in the highway adjacent thereto. The case was tried at Circuit, on appeal, before the court, who filed written findings of fact and law. The record does not show whether or not a plea was filed. The finding shows that the defendant's servants, when constructing its telephone line along the highway, trimmed out some branches of trees (some standing within the highway, and some in plaintiff's close), so that the wires might not come in contact with the branches, thereby becoming broken or grounded; that it was done in a reasonable manner, and that no more cutting or trimming was done than was necessary; and that, to do this, its servants took down the road fence, and, with a team and heavily loaded wagon, drove upon plaintiff's growing wheat "inside [probably meaning "outside"] the highway," and at the same time cut off certain limbs from all of said trees. The court found, as a conclusion of law, that, while the defendant might place poles in the highway without proceedings for condemnation, it had no right to cut, injure, or mutilate trees, without compensation to the owner for any special damage occasioned thereby. A judgment for \$25 was rendered in favor of the plaintiff, and the defendant has appealed.

It was admitted by plaintiff's counsel that the erection of a telephone line along the highway does not create an additional servitude upon abutting lands, and we need not cite authorities

in support of that proposition. The right being given to erect the poles and wire, the company must of necessity have the right to remove obstructions, as the highway officers have authority to do when engaged in highway work within their jurisdiction. We may take judicial notice that poles must be set near the sides of the street or road, and that they are generally outside of the curb or ditch line, and therefore necessarily in line with the trees. Unless they are to be so high as to clear all of them, the wires must go through the trees. In cities and villages this may require the removal of large portions of the trees, if they are to go through them, and in such case it is possible that the company should use poles sufficiently high to avoid or minimize the injury to the trees, but that question is not before us under the findings. The plaintiff cites several authorities in support of his contention. *Railway v. Mills*, 3 Am. Electl. Cas. 333, 85 Mich. 654, 48 N. W. 1007, is referred to, which, in the opinion of Mr. Justice GRANT, says that: "It may now be considered the well-settled rule that the streets of a city may be used for any purpose which is a necessary public one, and the abutting owner will not be entitled to a new compensation, in the absence of statute giving it. . . . So far, then, as these defendants are concerned, it is immaterial whether they or the city own the fee in the street. Their rights are the same in either case. So long as they are unobstructed in the use and enjoyment of their property, having convenient ingress and egress, and the use of the street is an authorized and proper public use, they have no legal cause for complaint." This opinion is concurred in by Mr. Justice LONG, while Mr. Justice CHAMPLIN said that: "If, in any case, it is such an invasion of private rights as to cause damage to the owner of the fee of the soil or abutting proprietors, I think they have a legal remedy to recover such damage in a suit at law. And so with regard to the setting of poles to aid the propulsion of cars by electricity. I do not think, ordinarily, it is such a taking of private property as requires condemnation and compensation

before the poles can be set; but I think, if the owner suffers damage on account of the erection of poles, he should seek his remedy at law for such damage." *Dean v. Railway*, 4 Am. Electl. Cas. 172, 93 Mich. 330, 53 N. W. 396, is cited as implying that, if one of the abutting owners has suffered any special damages, he may have an action at law; but this case does no more than to decide that the remedy for special injury to property is at law. It affirms the holding of the *Mills Case*, *supra*, that a new servitude is not created by a street railroad, but does not undertake to decide that a right of action existed. The case of *Hobart v. Railroad Co.*, 27 Wis. 194, held that: "The construction and operation of a horse railway in the public streets of a city, by authority from the city government, is not a new burden imposed upon the owners of the fee of the land; and they are not entitled to a compensation therefor, except when some private right of such an owner (as his free access to his own land or buildings) has been materially impaired thereby." It also held that: "The owner of a store has no such right to use the street in front thereof, by having drays and wagons, with teams attached, stand transversely upon the street while discharging goods, as will entitle him to recover against a horse-railway company which has so constructed its track (under authority from the city) as to interfere with such use of the street; but he may be compelled, if public convenience requires it, to discharge the goods from wagons or drays standing lengthwise of the street." The case is not in point. It vindicates the land-owner's right of access to the street, and at the same time sustains the paramount right of the public to a proper use of the highway. It is in harmony with the *Mills Case*. The case of *Tissot v. Telephone Co.*, 2 Am. Electl. Cas. 286, 39 La. Ann. 996, 3 South. 261, is not at variance with the other authorities, as it only sustains a right of action for invading plaintiff's premises, and so cutting branches overhanging the street as to leave an open space, from 25 to 40 feet in circumference, for the purpose of the passing of an almost imperceptible wire, and when the posts and

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wires could have been, with less or no inconvenience, located elsewhere. *Telephone Co. v. Hunt*, 2 Am. Electl. Cas. 282 (Tenn. Sup.), 1 S. W. 159, only holds that there is no right to enter private premises for the purpose of cutting branches. This is elementary. The case of *Magee v. Overshiner*, 7 Am. Electl. Cas. 241, said to be reported in 64 Am. P. R. 358, is cited upon the question, but we have been unable to find the case. None of these cases, unless it be the last mentioned, sustains plaintiff's principal contention, and we think it is not the law in this State. It might well be the law in a State where a telephone is an additional servitude in the absence of condemnatory proceedings.

It is said that the telephone company had no right to cut these branches without first giving the landowner an opportunity to do so himself. This claim is based on the case of *Clark v. Dasso*, 34 Mich. 86, in which it was held that a highway commissioner could not sell trees upon the highway, and intimating that, before he could remove trees that were a public obstruction, he must give the owner the opportunity. The case rested on a statute (Comp. Laws, 1871, sec. 1317) which authorized the cutting and removal of trees and shrubs obstructing or injuring a highway by order of the highway commissioners. Plainly, this case does not come within the statute, because the statute refers only to the cutting down or removal of trees and shrubs, not the trimming of trees; and, again, it is not a statute that purports to impose a duty upon commissioners, but was intended to exempt them from the penalty prescribed by statute, recognizing the possible necessity of removing trees in highways. Moreover, we do not discover that this statute is still in force, except in a modified form. 2 Comp. Laws, sec. 6159. If the telephone company has the right to have the branches cut to admit stringing and operating its wires, the legislature has committed to no one, unless it be the company, the authority to do this. No one could do this satisfactorily until the wires should be strung and, until the legislature provides otherwise, we must think that the companies

may do it, being answerable for any unnecessary, improper, or excessive cutting. We are convinced that it is the right of the company to cut branches in a proper case and manner, and in such case there is no liability to the abutting proprietor, who has no right to obstruct the public use of the highway. The case is reversed, and, as the findings show that a trespass upon the close may have been committed, a new trial is ordered. The other justices concurred.

NOTE.—See Mr. Keasbey's note to *Nicoll v. N. Y. & N. J. Teleph. Co.*, *post*.

WILMOT CASTLE, Appellant, v. THE BELL TELEPHONE COMPANY OF BUFFALO AND OTHERS, Respondents.

New York Supreme Court, Appellate Division, Fourth Department, March, 1900.

(49 App. Div. 437.)

TELEPHONE WIRES IN CONDUIT NO ADDITIONAL SERVITUDE.

The placing, with municipal consent, of a conduit for telephone wires owned by a private corporation beneath the surface of a street, the fee of which is in the abutting owners, to take the place of poles previously erected and used in the street, imposes no additional burden which entitles abutting owners to compensation.

Difference in this respect between urban and rural highways considered.

Cases of this series cited in opinion: *Halsey v. Rapid Transit St. Ry. Co.*, vol. 3, p. 283; *Cater v. Northwestern Teleph. Ex. Co.*, vol. 5, p. 111; *Julia Building Association v. Bell Teleph. Co.*, vol. 1, p. 801; *Pierce v. Drew*, vol. 1, p. 571; *Magee v. Overshiner*, vol. 7, p. 241; *People v. Eaton*, vol. 5, p. 87; *Hershfield v. Rocky Mountain Bell Teleph. Co.*, vol. 4, p. 73; *Lockhart v. Craig St. Ry. Co.*, vol. 3, p. 314; *Eels v. Am. Teleph. & Tel. Co.*, vol. 5, p. 92; *Palmer v. Larchmont Elec. Co.*, vol. 6, p. 128.

Appeal by plaintiff from order of Supreme Court, Monroe

Special Term, vacating an injunction restraining the completion of a conduit.

The plaintiff owns a lot on the west side of Oxford street in the city of Rochester, the fee of which extends to the center of the street.

The Bell Telephone Company of Buffalo for upwards of twenty years last past has owned and operated a telephone system in the same city, and in the conduct of its business has, until quite recently, maintained and used poles with wires strung thereon in the streets of the city. Its system, as thus located, was operated without objection from any source until 1888, when the common council adopted a resolution which in express terms granted to the company the right to erect and maintain its poles and appliances in the city streets, but the privilege thus conferred was subject to certain conditions, one of which was that the company should "at its own cost, place, and thereafter at all times maintain, its wires and cables and conduits underground in the principal streets, avenues and places of said city, as rapidly as possible, and to that end shall substitute in place of the present system at least one-half mile of underground conduits with all its cables and wires therein, in the present year 1888, and not less than one-half mile in each year thereafter, until at least three miles of conduits are completed and all its wires placed therein in the localities, and in the manner designated by, and also under the supervision of, the executive board or common council of said city. And should also grant "to the city the right to the use of all poles now or hereafter erected by said company . . . and of any conduit hereafter laid by it as aforesaid, for the purpose of maintaining all wires and cables belonging to or used by said city, at any time, in any of its departments or services thereof, . . . including those of the fire alarm telegraph and police patrol systems."

All the conditions thus imposed were duly accepted and their enforcement was provided for by a contract which was subsequently executed by both the company and the city.

Oxford street is one of the public streets of the city of Rochester, upon which the telephone company had erected its poles and appliances; and through the center of this street there is a grass plat about twenty feet in width, with a roadway upon either side. In pursuance of the requirements of the contract just referred to, the company in November, 1899, employed defendants Whitmore, Rauber and Vicinus to remove its Oxford St. wires from the poles to which they were then attached, and place them in an underground conduit, and to this end a ditch some two and one-half feet in depth and fifteen or twenty inches in width was excavated through the center of the grass plat above mentioned, the intention being to fill up the ditch when the wires were properly secured therein, and replace the sod upon the top thereof so as to interfere as little as possible with the surface of the street.

This work was undertaken by permission of the executive board of the city, but before it was consummated, the plaintiff brought this action, the main object of which is to restrain the defendants from further operations.

Joseph W. Taylor, for the appellant.

John A. Barhite, for the respondents.

ADAMS, P. J.: Several propositions are advanced and discussed with some degree of earnestness by the respective counsel in their briefs, but as they are all subsidiary to and dependent upon the right of a telephone company to place its appliances in or upon a public street of a populous and thriving city without making compensation to the owner of the fee, we shall direct our attention solely to the consideration of that feature of the case.

So much has been written respecting the rights and burdens incident to the ownership of land which has been taken for or dedicated to highway purposes, that a further discussion of the subject would seem almost like a work of supererogation, and yet it will be difficult, if not impossible, to properly consider the important question which this case presents without referring

somewhat to principles which have long since passed beyond the realm of controversy.

And at the outset it may be relevant to suggest that a public highway, while primarily intended for the accommodation of travelers employing the ordinary means of locomotion, such as vehicles drawn by animals, is, nevertheless, in another and broader sense, a public convenience. It is appropriated for that purpose, and when thus taken or dedicated nothing remains in the original proprietor but the naked fee, for, as has been well said, lands thus appropriated "are acquired for the purpose of providing a means of free passage common to all the people, and, consequently, may be rightfully used in any way that will subserve that purpose. By the taking the public acquire a right of free passage over every part of the land, not only by means in use when the lands were taken, but by such other means as the improvements of the age and new wants arising out of an increase in population or an enlargement of business may render necessary. It is perfectly consistent with the purposes for which streets are acquired that the public authorities should adapt them in their use to the improvements and conveniences of the age." *Halsey v. Rapid Transit St. R. Co.*, 3 Am. Electl. Cas. 283, 47 N. J. Eq. 380, 384.

Recognizing the fact that the "right of free passage" is a comprehensive term which, in this advanced age, may embrace the transmission of thought and words as a substitute for the actual physical passage of persons over a public highway, and thereby greatly facilitate social and commercial intercourse, the legislature of this State, in providing for the incorporation of telegraph and telephone companies, has expressly granted to them the right to construct their lines upon any of the public roads, streets or highways of the State, provided the same shall not be so constructed as to interfere with the public use of such roads or highways. (Laws of 1848, chap. 265, as amd. by Laws of 1853, chap. 471; Transportation Corporations Law, Laws of 1890, chap. 566, art. 8, sec. 102.)

A legislative enactment is, of course, of no value whatever as an authority for an encroachment upon a constitutional right, and in the present instance it is not cited for that purpose, but simply as evidence of a legislative belief that the construction of telegraph and telephone wires in a public highway is not inconsistent with the use for which such highway was originally designed; and this idea is by no means limited to impotent expressions of opinion, for it is one which has received express judicial sanction in some of our sister States, while in our own State it has been adopted by implication, so far at least as urban streets are concerned.

In *Cater v. Northwestern Telephone Ex. Co.*, 5 Am. Electl. Cas. 111, 60 Minn. 539, 547, which was a case involving the precise question we are now discussing, it was said concerning the rights of an abutting owner whose fee extended to the center of the street: "We are not unmindful that private property cannot be taken for a public use without compensation, however important that public use is. . . . But viewing, as we do, highways as being designed as public avenues of travel, traffic and communication, the use of which is not necessarily limited to travel and the transportation of property in moving vehicles, but extends as well to communication by the transmission of intelligence, it seems to us that such a use of a highway is within the general purpose for which highways are designed, and within the limitations which we have suggested, does not impose an additional servitude upon the land. In short, that it is *merely a newly-discovered method of using the old public easement.*"

In *Julia Building Ass'n v. Bell Telephone Co.*, 1 Am. Electl. Cas. 801, 88 Mo. 258, the defendant was engaged in erecting poles in a public street, to the center of which the fee was in the plaintiff, and the court, in holding that the poles did not impose an additional burden upon the easement in the street, said: "As civilization advances new uses may be found expedient."

In *Pierce v. Drew*, 1 Am. Electl. Cas. 571, 136 Mass. 75, the Supreme Court of Massachusetts, in discussing the constitution-

ality of a legislative grant to a telegraph company of the right to erect its poles and wires in a public highway, without compensation to adjoining owners, uses this language: "When the land was taken for a highway, that which was taken was not merely the privilege of traveling over it in the then known vehicles, or of using it in the then known methods, for either the conveyance of property or transmission of intelligence. . . . The discovery of the telegraph developed a new and valuable mode of communicating intelligence. Its use is certainly similar to, if not identical with, that public use of transmitting information for which the highway was originally taken, even if the means adopted are quite different from the post-boy or the mail-coach. It is a newly-discovered method of exercising the old public easement, and all appropriate methods must have been deemed to have been paid for when the road was laid out." And the same doctrine has been declared in Indiana (*Magee v. Overshiner*, 7 Am. Electl. Cas. 241, 49 N. E. Rep. 951), in Michigan (*People v. Eaton*, 5 Am. Electl. Cas. 87, 100 Mich. 208), and in Montana (*Hershfield v. Rocky Mt. Bell Tel. Co.*, 4 Am. Electl. Cas. 73, 12 Mont. 102).

It is but fair to say, however, that in several of the States the decisions are not in harmony with those to which attention has been directed, while in others, including our own, the courts have apparently limited the application of the rule for which the defendant is contending to streets in cities. For example, in *Lockhart v. Craig St. Ry. Co.*, 3 Am. Electl. Cas. 314, 139 Penn. St. 419, the distinction between an easement in a country and a city street is thus clearly stated: "It has generally been understood in Pennsylvania that the abutting owner has a fee to the middle of the adjoining street, and that the public has only a right of passage over it; . . . but this must not be taken in its literal sense, especially in towns and cities. What might be considered an invasion of private right, so far as the use of a highway is concerned in the country, might not be so in a city.

"And it may now be taken as settled that the owner's rights as to abutting property are subject to the paramount right of the public, and the rights of the public are not limited to a mere right of way, but extend to all beneficial legitimate street uses, such as the public may from time to time require."

And again, in *Eels v. A. T. & T. Co.*, 5 Am. Electl. Cas. 92, 143 N. Y. 133, which was a case where the defendant had erected telegraph poles in a country highway, it was held that the State can neither appropriate to its own special, continuous and exclusive use, nor can it authorize a corporation to so appropriate any portion of a *rural* public highway, by setting up poles therein for the purpose of supporting telegraph and telephone wires. But the court, in reaching this conclusion, recognized the fact that the easement in a public street in a city or village might well be enlarged by the necessities of the case, and it was careful to say that it neither decided nor intimated that "the defendant would or would not have the right to place its poles in the city street without compensation to the owner if he owned to the center of the street."

Nor is the distinction to which we have adverted altogether a product of recent investigation, for as long ago as 1863 it was said by a jurist of conceded ability that he did not believe it "necessary or possible for the courts to lay down the exact limits of the uses to which land dedicated to a street in a great city may be applied, or for which it may be required." EMOTT, J, in *People v. Kerr*, 27 N. Y. 188, 203.

Subsequently, and in 1875, the language above quoted was cited with approval by the Court of Appeals, and it was supplemented by the further declaration that "it may be urged with some apparent reason that the appropriation of land for a street in a city carries with it the idea that it is to be used for all necessary purposes, as such street, which the interest of the public and the comfort, enjoyment or the health of the locality may demand." *Bloomfield, &c., Gas Light Co. v. Calkins*, 62 N. Y. 386.

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In 1883 the General Term of the second department, in speaking of urban streets, asserted that "the requirements of the public in such a place are more numerous than in a rural locality; and streets and avenues are to supply such demands; a mere right of passage over the surface is quite insufficient." *Crook v. Flatbush Water Works Co.*, 29 Hun, 245, 247.

And in a still more recent case the Court of Appeals, in referring to the distinction between the two classes of highways, gave utterance to this significant language: "The public easements, however, in the streets of cities and villages are more extensive. In urban streets, the public convenience and health and the general welfare require that the soil thereof should be subjected to greater burdens. They may be used for the laying of water and gas pipes and the construction of sewers, and some other purposes. *The public generally have an interest in and are benefited by such improvements, and they are necessities of modern life.*" *Van Brunt v. Town of Flatbush*, 128 N. Y. 50.

The last adjudicated case in which this question has received consideration at the hands of the court of last resort is that of *Palmer v. Larchmont Electric Co.*, 6 Am. Electr. Cas. 128, 153 N. Y. 231. Considerable stress is there laid upon the distinction which is said to exist between the use of a street for a municipal or mere street purpose, and it was held that inasmuch as light is necessary to the traveling public, a country highway might be burdened with poles and wires for the purpose of operating an electric light system, whereas it could not be thus burdened for the transmission of intelligence by electricity, because the former is, and the latter is not, a purely street purpose.

Whether the use of a street by a telephone system is to be classified as a "municipal purpose" is not stated by the learned jurist by whom the opinion of the court was delivered, and so far as this particular case is concerned, it is, perhaps, of little consequence to which class it ought to be assigned, for we are now dealing with the purpose to which a street in a populous city may properly be devoted, and upon the authority of the cases to

which we have referred, including the one last cited, we shall assume that it is now the settled law of this State that in circumstances such as surround the present case the rights of an abutting owner, even though his fee extends to the center of the street, are subject to the paramount right of the public to use such street for any purpose which the enjoyment, comfort and convenience of the locality may require; and thus we come finally to what we deem the controlling question in this case, viz.: Is this newly-discovered method of transmitting intelligence a public convenience; and, if so, is it one to the use of which a street in a populous city may be devoted consistently with the general purpose for which that street was originally designed?

So far as the first branch of this inquiry is concerned we assume that it may be unhesitatingly answered in the affirmative; for of all the discoveries of modern science the telephone is one of the most wonderful, as it is one of the most useful, and its convenience is more specially appreciated by the residents of large cities whose homes are generally at a great distance from their places of business. This simple contrivance annihilates space, and by its aid relatives and friends widely separated may communicate with each other; business of vast importance may be transacted; a physician may be summoned in case of illness and assistance obtained whenever a fire or other calamity overtakes a person. In short, there are a thousand ways in which it can be used to such advantage as to render it well-nigh indispensable to an urban resident. And this being the case, why is its maintenance a purpose for which a city street may not properly be used? As has been said by an eminent text writer, "with respect to streets in populous places, the public convenience requires more than the mere right to pass over and upon." 2 Dillon Mun. Corp. sec. 688.

And in the light of recent discoveries it might be added that public convenience requires that they be used for the very purpose for which the defendants are attempting to use the one in question.

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We have seen that the transmission of intelligence by electricity is not only a public convenience, but a public necessity, and where, as in the present instance, the means employed for such communication neither disfigures the surface of the street nor interferes in any degree with its use by travelers upon foot or in vehicles, no good reason suggests itself to our mind why it should be regarded as an additional burden, entitling the owner of the fee to further compensation.

The rule which commends itself to our approval in cases of this character is the one which was laid down by the Supreme Court of the United States when it declared that "On the general question as to the rights of the public in a city street, we cannot see any material difference in principle with regard to the extent of those rights, whether the fee is in the public or in the adjacent landowner, or in some third person. In either case the street is legally open and free for the public passage, and for such other public uses as are necessary in a city, and do not prevent its use as a thoroughfare." *Barney v. Keokuk*, 94 U. S. 324, 340.

We conclude, therefore, that the order appealed from should be affirmed.

All concurred, except Laughlin, J., who dissented in a memorandum.

NOTE.—See Mr. Keasbey's note to *Nicoll v. N. Y. & N. J. Teleph. Co.*, *post.*

COBURN V. THE NEW TELEPHONE COMPANY.

Indiana Supreme Court, February 1, 1901.

(156 Ind. 90.)

TELEPHONE WIRES IN CONDUIT NO ADDITIONAL SERVITUDE.

The occupation of a sidewalk with trench and pipes as a conduit for telephone wires is not a new servitude not within the contemplated uses of

the street, and is, therefore, no additional burden upon the fee for which an abutting owner would be entitled to compensation.

Cases of this series cited in opinion: *Mages v. Overshiner*, vol. 7, p. 241; *Julia Bldg. Ass'n v. Bell Teleph. Co.*, vol. 1, p. 801.

Appeal by plaintiff from a judgment of the Circuit Court of Marion county sustaining a demurrer to plaintiff's bill.

J. Coburn and D. W. Howe, for appellant.

L. C. Walker, for appellee.

HADLEY, J.: The appellant is the owner of a lot of land in the city of Indianapolis abutting on Delaware street 45 feet, and on New York street 125 feet. Both of these streets are public streets of said city, each 90 feet wide, and 25 feet on each side of New York street has been set apart and improved as sidewalks. Appellant also owns, subject to the public easement thereon for street purposes, so much of each said public street as lies opposite and adjacent to the front side of his said lot to the middle of each of said streets. At present his lot has no improvements thereon, but appellant contemplates and intends to erect a large business block on it, with cellars, basement and vaults extending under the sidewalk in front and at the side of his said lot. The appellee, a telephone company organized and doing business under the laws of this State, without leave or license from the appellant, and without having taken any steps to condemn or appropriate any portion of the ground covered by said street in front and alongside of appellant's lot, or to assess appellant's damages therefor, and without notice to appellant, did on the 12th day of July, 1898, by its officers, agents, and employees, wrongfully dig a trench about three feet wide and five feet deep in the sidewalk about three feet from the south line of said New York street, along the entire portion thereof extending and abutting upon the appellant's said lot, and said company is engaged in cementing the same and placing pipes therein; and as soon as

said trench shall be completed said company threatens to, and will if not restrained, put in wires and use the same as a conduit of telephone wires permanently. The deposit of pipes, cement, and wires will be a complete obstruction of the use of said grounds under said street by the appellant, will permanently destroy his rights therein, will deprive him of the use of the same forever, and will greatly impair the value of his property, inflicting upon him irreparable loss and injury, which cannot be accurately estimated or compensated in damages. Appellant discovered the foregoing proceedings and acts of the appellee July 12, 1898, and instituted this suit on the next day thereafter. The foregoing facts are shown by the complaint, and the appellant asked for a temporary order enjoining the further prosecution of the said work by the appellee, and that on the final hearing he might have a permanent injunction. The appellee demurred to the complaint for the want of sufficient facts, and its demurrer was sustained. This ruling is assigned as error.

The principal ground upon which appellant seeks a reversal is that the city had no power to dig, or to authorize appellee to dig, the trench complained of, until the damage resulting to appellant had first been assessed and tendered. He says: "We concede that an abutting lot owner has no legal right to complain of the erection of telephone poles or the digging of telephone trenches in the street, so long as this is no special injury to him; in other words, if there is no injury to him beyond the interference with his abstract right of property in the street itself, such as he holds in common with all other abutting lot owners, he has no legal grounds of complaint." His right of recovery then must rest upon some special injury to his absolute property right which he holds in the street as an abutter, and which he has the right to defend against the city or its licensee. Under many decisions of this court, the fee owner of an abutting lot, whose grantor dedicated the public easement in connection with the platting of the lot, owns also the fee in the land to the center of

the street, subject to the easement of the public to make use of the street as was reasonably contemplated in the dedication, grant, or condemnation. *Terre Haute, etc., R. Co. v. Scott*, 74 Ind. 29, and cases cited; *Chicago & C. T. Ry. Co. v. Whiting, H. & E. C. St. Ry. Co.*, 139 Ind. 297, 301, 47 Am. St. 264. The appellant must, therefore, show that the alleged occupation of the sidewalk with trench and pipes as a conduit for telephone wires is a new servitude not within the contemplated uses of the street, and therefore an additional burden upon his fee, for which he is entitled to recompense. The fact that the entry complained of is upon and under the sidewalk, rather than under the roadway, makes no difference, since a street is a street from property line to property line,—not only the entire surface, but also so much of the depth as is or can be fairly used for the ordinary purposes of a street, each part equally with every other. *State v. Berdetta*, 73 Ind. 185, 38 Am. Rep. 117; Elliott, *Roads & S.* (2d Ed.) secs. 17, 20. Neither can it be said, in the absence of a grant or a general usage equivalent to a municipal license, that the fee owner has any greater or different property right in that part of the street used as a sidewalk for foot travelers than in that part used as a roadway for vehicles. He may, we think, excavate and improve under the surface from his lot line to the center line of the street, or any part of it, and use his fee property as he pleases (Elliott, *Roads & S.* [2d Ed.] sec. 690, and cases cited), so long as his use does not impede or interfere with the superior right of the public to use the ground for purposes contemplated by the easement grant. Such fee owner, however, must know that the estate he holds within the limits of the street is servient, and his property right therein qualified, and that any expenditure of labor or money in improvements will neither oust nor impair the right of the municipality to take possession, for a proper purpose, at any time the public interests require; and, in yielding possession under such circumstances to the superior right of the public, he parts with nothing he owns, and the losing in itself is no special injury, nor

a taking of property without compensation. *Magee v. Over-shiner*, 7 Am. Electl. Cas. 241, 150 Ind. 127, 40 L. R. A. 370, 65 Am. St. 358; *Julia Bldg. Ass'n v. Bell Tel. Co.*, 1 Am. Electl. Cas. 801, 13 Mo. App. 477; *Davis v. City of Clinton*, 50 Iowa, 585; *Julia Bldg. Ass'n v. Bell Tel. Co.*, 1 Am. Electl. Cas. 801, 88 Mo. 258; Dill. Mun. Corp. (4th Ed.) sec. 699. Dillon, in the section quoted, says: "If the fee of the street is in the municipality in trust for the public uses, as it frequently is, it extends to the whole street, including the sidewalk; and the adjoining lot owner has, it seems clear, no absolute right, as against the public or the municipality charged with the control of the streets, to appropriate them to this use. And, in our judgment, the lot owner's right is not substantially greater, even if he has the fee in the street. In either case, to recognize such a right, except subject to municipal regulation, would be inconsistent with the public rights, which are paramount in the whole street to the extent of all legitimate street uses and servitudes required, or which may be required, for the public benefit and convenience. The lot owner's rights are subject to the paramount rights of the public; and the rights of the public are not limited to a mere right of way, but extend, as we have shown, to all beneficial legitimate street uses, as the public good or convenience may from time to time require. The use of the streets for sewers, tunneling, public cisterns, gas pipes, water pipes, and other improvements might be seriously affected by the recognition of a right in the abutter to make at pleasure openings in, or even under, the sidewalk or street, except subject to reasonable municipal regulations." In *Julia Bldg. Ass'n v. Bell Tel. Co.*, 1 Am. Electl. Cas. 801, 88 Mo., at page 273, it is said: "I think it may be safely affirmed that all the authorities to which we have been cited by counsel on both sides of this case agree that when the public acquires a street, either by condemnation, grant, or dedication, it may be applied to all uses consistent with, and not subversive of, the proper uses of a street, and not inconsistent with the uses contemplated in the dedication, grant, or condem-

nation, and that it is only when the street is subject to a new servitude inconsistent with and subversive of its use as a street, that the abutting owner can complain."

The question then arises, is the construction of a subsurface trench in a sidewalk, three feet wide and five feet deep, and three feet from the abutter's lot line, for the purpose of permanently maintaining such trench as a conduit for telephone cables and wires to be used by the city public in intercommunication by electricity, such a use of the street as is consistent with the contemplated purpose of the dedication? In principle, the question has been recently answered in the affirmative by this court in *Magee v. Overshiner*, 150 Ind. 127. The question in that case was whether the setting of telephone poles in the curb line of a street was a proper public use of the street, or a new and additional servitude upon the fee, for which the owner was entitled to compensation; and the nature and extent of the public easement in municipal highways, and the expansive and growing character of the easement in keeping pace with scientific discovery and the increase of population, is there thoroughly reviewed, and many of the later cases collected. The general doctrine of these cases is that in locating, marking, and dedicating streets in plats of land for urban residences, the purpose of the dedication, in the absence of controlling language, is conclusively presumed to be for the accommodation of public travel, traffic, and communication. Anything which reasonably facilitates these ends is, therefore, consistent with the dedication. In sparsely settled towns and cities public necessity requires but little of the servient owner, beyond the right of unobstructed passage over the street, but, as cities become populous and the street crowded with traveling footmen and vehicles, public necessity increases with the multitude; and, whenever the necessity exists, any use of the street by reasonable structures and devices, above or below the surface, which will enable the citizens to communicate without actual travel upon the streets, and which does not materially obstruct the ingress and egress and light and air to abutting

property, is within the contemplated purpose of the dedication, and not a new burden upon the fee. A reason for this doctrine is given in *Julia Bldg. Ass'n v. Bell Tel. Co.*, 1 Am. Electl. Cas. 801, 88 Mo. at page 268, in these words: "These streets are required by the public to promote trade and facilitate communications in the daily transactions of business between the citizens of one part of the city and those of another, as well as to accommodate the public at large in these respects. If a citizen living or doing business on one end of Sixth street wishes to communicate with a citizen living and doing business on the other end or at any intermediate point, he is entitled to use the street, either on foot, on horseback, or in a carriage or other vehicle, in bearing his message. The defendants in this case propose to use the street by making the telephone poles and wires the messenger to bear such communications instantaneously and with more dispatch than in any of the above methods, or any other known method of bearing oral communications. Not only would such communications be borne with more dispatch, but to the extent of the number of communications daily transmitted by it, the street would be relieved of that number of footmen, horsemen, and carriages. If a thousand messages were daily transmitted by means of telephone poles, wires, and other appliances used in telephoning, the streets through these means would serve the same purpose, which would otherwise require its use either by a thousand footmen, horsemen, or carriages to effectuate the same purpose. In this view of it, the erection of telephone poles and wires for transmission of oral messages, so far from imposing a new and additional servitude, would, to the extent of each message transmitted, relieve the street of a servitude or use by a footman, horseman, or carriage." A distinguished author says: "When land is taken or dedicated for a town street, it is unquestionably appropriative for all ordinary purposes of a town street,—not merely the purposes to which such streets were formerly applied, but those demanded by new improvements and new wants." Cooley, Const. Lim. 5556. If the setting of poles,

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and the stringing thereon of a body of telephone wires overhead, in a street, which at best is some obstruction to travel and to the manipulation of apparatus for the extinguishment of fires, is a legitimate exercise of the public easement, there is a stronger reason for asserting that the laying of cables and wires under the surface for a like purpose, with municipal authority, is a proper use of the street, and for which, if skillfully performed, the fee owner has no ground of complaint.

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Judgment affirmed.

NOTE.—See Mr. Keasbey's note to next case.

BENJAMIN NICOLL ET AL. v. NEW YORK & NEW JERSEY TELEPHONE COMPANY.

New Jersey Court of Errors and Appeals, March 6, 1899.

(62 N. J. L. 733.)

TELEPHONE LINE ADDITIONAL SERVITUDE.—EMINENT DOMAIN.

(Head-note by the Court):

The right of a telephone company to erect a telephone line within the limits of a public highway, upon land the fee of which is owned by private persons, imposes an additional servitude upon the fee, and can be acquired, against the consent of such persons, only through the power of eminent domain.

Proceedings to acquire such a right under the Telegraph and Telephone Companies' Act (3 Gen. St. p. 3460) are regulated by the Eminent Domain Act (2 Gen. St. p. 1386).

Under the Eminent Domain Act (2 Gen. St. p. 1386), it is not essential to the jurisdiction of the court to which an appeal from the award of commissioners has been taken that the appellant should, within ten days after filing the petition of appeal, give written notice of the appeal to the opposite party; and, under exceptional circumstances, the court may

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legally proceed to try the appeal, although such notice was not given within the time stated.

Cases of this series cited in opinion: *Broome v. N. Y. & N. J. Teleph. Co.*, vol. 2, p. 259; *State, Duke, pros., v. Cent. N. J. Teleph. Co.*, vol. 3, p. 546; *Halsey v. Rapid Trans. St. Ry. Co.*, vol. 3, p. 283; *Paterson Ry. Co. v. Grundy*, vol. 4, p. 173; *Mages v. Overshiner*, vol. 7, p. 241.

Appeal by petitioners from order dismissing writ of certiorari.

S. H. Little, for plaintiffs in error.

John B. Vreeland and George T. Werts, for defendant in error.

DIXON, J.: This writ of error brings up a judgment of the Supreme Court dismissing a writ of certiorari sued out by the plaintiffs in error on the following state of facts: The plaintiffs in error are owners of lands in Morristown, fronting on Sussex avenue, and having for their southerly boundary the middle of the avenue. In 1896 the defendant in error commenced proceedings, under the Telegraph and Telephone Companies Act of June 20, 1890 (3 Gen. St. p. 3460), to acquire a right to place poles and wires for a telephone line on the plaintiff's land, in said avenue. According to the order made in said proceedings, the commissioners' appraisement of damages was to be filed, and in fact was filed, by May 1, 1897; and on May 4, 1897, the defendant filed with the Circuit Court of Morris county a petition of appeal from said appraisement, but failed to serve notice of appeal upon the plaintiffs until August 27, 1897. Notwithstanding this failure, the Chief Justice, sitting in said circuit, made the order for trial, etc. prescribed by the third section of the Eminent Domain Act of March 9, 1893 (2 Gen. St. p. 1386), but allowed a certiorari to test the legality of the order. The legality of the order is denied by the plaintiffs, because written notice of the appeal was not served upon them within ten days after the filing of the petition of appeal, as directed by said Act

of 1893; but the certiorari was dismissed by the Supreme Court, upon the ground that the proceedings were not governed by that act, because the acquisition of the right sought by the defendant was not "the taking of property for public use," to which alone the Act of 1893 is applicable.

The language of the Act of 1893 is evidently borrowed from the constitutional injunction that "private property shall not be taken for public use without just compensation," and clearly expresses a purpose to regulate the procedure for all cases within the scope of that injunction, since it enacts that "all acts or provisions inconsistent with the provisions of this act shall be and are hereby repealed, and the practice prescribed by this act shall supercede the existing practice in all condemnation cases before commissioners or on appeal, so far as the provisions of this act shall extend." We must therefore consider whether the acquisition by a telephone company of a right to erect poles and place wires and other fixtures for telephonic purposes along a public street, wherein the fee of the land belongs to private persons, without the consent of such persons, is the taking of private property. If the land were not subject to the easement of a public street, the matter would not be debatable; but it is equally clear that, whenever the property of the owner of the fee in a highway is subjected by law to an additional servitude, it is taken, within the meaning of the constitution. The contention therefore must be over the question whether the right thus to be acquired would be an additional servitude upon the fee, or is embraced within the public easement, and hence grantable by the public for public use, without regard to the owner of the fee. The public easement, as interpreted in this State, is primarily a right of passage over the surface of the highway, and of so using and occupying the land within it as to facilitate such passage. In this primary right are included the grading, paving, cleaning, and lighting of the highway, the construction and maintenance of street railways, with the apparatus proper for their use, and the maintenance of appliances conducive to

the protection and convenience of travelers while using the way. Secondly, the easement covers uses which, though their relation to the right of passage is remote, or even fanciful, are so generally advantageous to the owners of the fee—the owners of abutting property—that, rather by common consent and custom than by logical deduction from the primary design, they are now recognized as legitimate. Such are the construction and maintenance of sewers, water pipes, and gas pipes for the convenience of persons occupying neighboring lands. *State v. Laverack*, 34 N. J. Law, 201.

The argument to support the proposition that the right to construct and maintain a telephone line for common public use is within this easement is that the structures required for the exercise of the right are mere adaptations of the road to the passage of the electric current, which thus travels along the highway. But the resemblance between this use and that ordinarily enjoyed under the easement scarcely goes beneath the words by which it may be described. In reality, the electric current does not use the highway for passage. It uses the wire, and would be as well accommodated if the wire were placed in the fields or over the houses. The highway is used only as a standing place for the structures. Such a use seems to us to be so different from the primary right of passage as to be essentially distinct. Nor does it rest on the same footing as those secondary uses to which allusion has been made. Telephone lines in a street do not afford to the occupants of neighboring property such general convenience, nor have they been permitted with such common and continued acquiescence, as sanction the other uses mentioned. We therefore think that the right now under consideration is not within the public easement, and can be acquired, against the consent of the private owner of the fee, only by condemnation under the power of eminent domain. To this effect has been the trend of judicial opinion in this State. *Turnpike Co. v. News Co.*, 43 N. J. Law, 381; *Broome v. Telephone Co.*, 2 Am. Electl. Cas. 259, 49 N. J. Law, 624, 9 Atl.

754; *Duke v. Telephone Co.*, 3 Am. Electl. Cas. 546, 53 N. J. Law, 341, 21 Atl. 460; *Marshall v. City of Bayonne*, 59 N. J. Law, 101, 34 Atl. 1080; *Halsey v. Railway Co.*, 3 Am. Electl. Cas. 283, 47 N. J. Eq. 380, 393, 20 Atl. 859; *Railway Co. v. Grundy*, 4 Am. Electl. Cas. 173, 51 N. J. Eq. 213, 225, 26 Atl. 788. Our legislation also has seemed to rest on the same opinion. We deem it unnecessary to discuss the views of courts in other jurisdictions. They are irreconcilable, and those on each side may be found cited in *Magee v. Overshiner*, 7 Am. Electl. Cas. p. 241, 49 N. E. 951, where the Supreme Court of Indiana arrived at a conclusion opposed to that above expressed.

The question therefore arises whether, in view of the act of 1893, the writ of certiorari was properly dismissed. This question is treated in the argument before us as depending upon the power of the Circuit Court or a judge thereof to make an order for the trial of the appeal, in a case where the appellant has not given to the other party written notice of the appeal within ten days after filing the petition. Without stopping to inquire whether there exist any technical objections to the review of such an order by certiorari, and before the final determination of the appeal, we will consider the matter as it has been presented.

The case of *Jones v. Proprietors of Morris Aqueduct*, 36 N. J. Law, 206, 37 N. J. Law, 556, is urged as a controlling authority in favor of the plaintiffs in error. The principle laid down in that case is that, in considering whether a statutory prescription is mandatory or merely directory, the legislative will must be ascertained, not from the meaning of the text of the statute alone, but from such words interpreted in view of the general object of the particular act. On that principle, the court concluded that the requirement of notice was, according to law then *sub judice*, mandatory. There is, however, an obvious distinction between that case and this. There the notice required was clearly made a condition precedent to the jurisdiction of the court over the appeal, the words of the act being

"which petition and notice so served or published shall vest in said court full power to hear and determine said appeal. Here the requirement of notice presupposes an appeal taken and jurisdiction over the subject-matter vested in the court, for the notice is to set forth that an appeal has been taken, and the statute expressly authorizes the judge of the court to which the appeal is taken to direct how, in certain contingencies, the notice shall be given. In cases like the former the statute must be held mandatory, for there is no impartial tribunal to lay down a rule in accordance with the spirit, though not the letter, of the law, if it be deemed directory only; while, in the other class of cases, judicial discretion may be invoked to determine—First, whether the statute demands exact compliance with its terms, and, if not, what will amount to substantial compliance, in view of the main purpose of the legislation. No doubt, if the legislature, within the range of its power, has evinced an intention to make the lawful continuance of a cause in court, or the lawful interposition of a defense to such a cause, dependent on strict obedience to the rule which it prescribes, courts as well as parties are bound thereby; but, in deciding whether such an intention appears, there is always present the presumption of a legislative design that courts shall administer justice in pending causes, and regulate their practice to that end. When, with this presumption, we examine the statute under review, the requirement of a written notice within ten days after filing the petition of appeal does not seem to be absolute and imperative. This appears—First, from the provision that, when the party to be notified cannot be found in the State, the judge of the court may direct a substituted notice to be given; and, secondly, from the provision that "the court shall make such further orders and take such further proceedings as may be requisite according to the practice of the court, and may permit such amendments of the proceedings as may be reasonable and proper for the fair trial of the case." These clauses indicate that the chief object of the legislature was to secure a fair trial for the liti-

gants when once the case was brought into court, and that, while it regulated the practice for cases which presented no exceptional features, its rules were not meant to be inflexible, but were subjected to the judicial discretion of the court when special circumstances intervened which would render their strict enforcement subversive of the main design.

Under what special circumstances the Chief Justice made the order now in question, notwithstanding the lack of written notice given within the time limited, the state of the case before us does not disclose; and therefore we must assume that they were such as called for the exercise of judicial discretion. That discretion cannot possibly be reviewed without knowledge of the matters with which it dealt. Our conclusion is that the writ of certiorari was rightly dismissed.

NOTE by Edward Q. Keasbey, Esq.:

Are telegraph or telephone lines a new burden on the highway? There is much difference of opinion on this subject between the courts of different States. On the one side, it is argued that the easement of highway is in the last analysis for the purpose of inter-communication; not merely travel and transportation but also the transmission of intelligence, and that for this purpose the telegraph is only an improvement upon the post-horse or the mail wagon; and on the other side it is contended that the streets were intended primarily for travel and transportation, and that the mode of transmitting intelligence by the telegraph is wholly different from the former use of the road and involves the permanent appropriation of the soil for poles, and that the landowner who dedicated his land for a road cannot be supposed to have contemplated that it should be used for this purpose without further compensation. See Keasbey on Electric Wires, secs. 89-90.

On the one side are the following cases: *Gay v. Mutual Union Teleg. Co.*, 12 Mo. App. 485, 1 Am. Electl. Cas. 427; *Forsythe v. B. & O. Teleg. Co.*, 12 Mo. App. 494; *Pierce v. Drew*, 136 Mass. 75, 1 Am. Electl. Cas. 571; *Julia Building Association v. Bell Teleph. Co.*, 88 Mo. 258, 1 Am. Electl. Cas. 801; *St. Louis v. Bell Teleph. Co.*, 96 Mo. 623, 2 Am. Electl. Cas. 44; *Irwin v. Great Southern Teleph. Co.*, 37 La. Ann. 63, 1 Am. Electl. Cas. 709; *Hewett v. W. U. Teleg. Co.*, 4 Mackey (D. C.), 424, 2 Am. Electl. Cas. 222, 2 Cent. Rep. 694; *McCormick v. District of Columbia*, 4 Mackey (D. C.), 396, 54 Am. Rep. 284; *Hershfield v. Rocky Mt. Bell Teleph. Co.*, 12 Mont. 102, 4 Am. Electl. Cas. 72; *People v. Eaton*, 100 Mich. 208, 5 Am. Electl. Cas. 87; 24 L. R. A. 721, with note; *Cater v. N. W. Each. Teleph. Co.*, 6 Minn. 539, 63 N. W. Rep. 111, 5 Am. Electl. Cas. 111; *York Teleph.*

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Co. v. Keesey, 5 Pa. Dist. Ct. R. 366, 6 Am. Electl. Cas. 107; *Mages v. Overshiner*, 150 Ind. 127, 49 N. E. Rep. 951, 7 Am. Electl. Cas. 241; *Roake v. Am. Teleph. & Teleg. Co.*, 41 N. J. Eq. 35, 2 Am. Electl. Cas. 218 (wires without poles).

On the other side are the following cases: *Dusenbury v. Mutual Teleg. Co.*, 1 Abb. N. C. (N. Y.) 440, 1 Am. Electl. Cas. 448; *Metropolitan Teleph. & Teleg. Co. v. Colwell Lead Co.*, 67 How. Pr. 365, 50 N. Y. Super. Ct. 488, 1 Am. Electl. Cas. 662; *Blashfield v. Empire State Teleph. & Teleg. Co.*, 71 Hun, 532, 24 N. Y. Supp. 1006, 4 Am. Electl. Cas. 92; *Eels v. Am. Teleph. & Teleg. Co.*, 143 N. Y. 133, 5 Am. Electl. Cas. 92; *Postal Tel. Cable Co. v. Bruen*, 39 N. Y. Supp. 220, 6 Am. Electl. Cas. 120; *Willis v. Erie Teleg. & Teleph. Co.*, 37 Minn. 347; *Board of Trade Teleg. Co. v. Barnett*, 107 Ill. 507, 27 Am. Rep. 453, 1 Am. Electl. Cas. 565; *Smith v. Cent. Dist. Pr. & Teleg. Co.*, 2 Ohio C. C. R. 259, 2 Am. Electl. Cas. 237; *Postal Tel. Cable Co. v. Eaton*, 170 Ill. 513, 49 N. E. Rep. 365, 7 Am. Electl. Cas. —; *Am. Teleph. & Teleg. Co. v. Jones*, 78 Ill. App. 372; *Daily v. State of Ohio*, 51 Ohio St. 348, 5 Am. Electl. Cas. 186; *Pacific Postal Teleg. Co. v. Irvine*, 49 Fed. Rep. 113, 4 Am. Electl. Cas. 140; *Spokane v. Colby*, 10 Wash. 610, 48 Pac. Rep. 248, 7 Am. Electl. Cas. —; *W. U. Teleg. Co. v. Williams*, 86 Va. 896, 11 S. E. Rep. 106, 3 Am. Electl. Cas. 184; *Chesapeake & Pot. Teleg. Co. v. Mackenzie*, 74 Md. 36, 21 Atl. Rep. 600, 3 Am. Electl. Cas. 196; *Stevens v. Postal Teleg. Cable Co.*, 68 Miss. 559, 9 So. Rep. 356; *Theobald v. Railway Co.*, 66 Miss. 279, 6 So. Rep. 356; *Am. Teleph. & Teleg. Co. v. Pearce*, 71 Md. 535, 18 Atl. Rep. 910, 3 Am. Electl. Cas. 169 (telegraph along a railway).

The subject is discussed in Lewis Em. Dom. sec. 131; Dillon Mun. Corp. (4th Ed.) secs 698, 698a; Elliott on Roads and Streets, pp. 583-6; Randolph on Eminent Domain, pp. 229-235, and in the notes in 2 Am. R. R. & Corp. Rep. 258-268, 1 id. 73-86, 2 id. 56, 28 Am. St. Rep. 229-235, and Keasbey on Electric Wires, chap. VIII.

Whether or not the telegraph line is a new burden on the land, the owner has a right to compensation for any substantial obstruction to his light, air or access. Keasbey on Electric Wires, sec. 105; *H. Clausen & Sons Brewing Co. v. B. & O. Teleg. Co.*, 2 Am. Electl. Cas. 210; *Zehren v. Milwaukee Elec. Ry. & Lt. Co.*, 99 Wis. 83, 74 N. W. Rep. 538, 7 Am. Electl. Cas. —; *Jaynes v. Omaha St. Ry. Co.*, 53 Neb. 631, 74 N. W. Rep. 67, 7 Am. Electl. Cas. —; and it has been held that he is entitled to compensation for injury to trees along the roadside. *Board of Trade Teleg. Co. v. Barnett*, 107 Ill. 507, 1 Am. Electl. Cas. 505; *Dailey v. Ohio*, 51 Ohio St. 348, 5 Am. Electl. Cas. 186; *Clay v. Postal Teleg. Co.*, 70 Miss. 406, 7 So. Rep. 658, 4 Am. Electl. Cas. 224; *McCruder v. Rochester St. Ry. Co.*, 28 N. Y. Supp. 13, 4 Am. Electl. Cas. 224; and, on the other hand, it has been held that even assuming the telegraph line to be a new burden, the right of the landowner in trees in the street is subject to municipal needs with respect to a fire-alarm telegraph. *Southern Bell Teleph. Co. v. Francis*, 100 Ala.

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224, 6 Am. Electl. Cas. 160, 19 So. Rep. 1; *Southern Bell Teleph. Co. v. Constantine*, 61 Fed. Rep. 61, 4 Am. Electl. Cas. 219; and also that the telegraph company is liable for wanton or unnecessary damage. *Tissot v. Great Southern Teleph. & Teleg. Co.*, 39 La. Ann. 996, 3 So. Rep. 261, 2 Am. Electl. Cas. 286; *Gorham v. East Chester Elec. Co.*, 80 Hun, 290, 30 N. Y. Supp. 128, 5 Am. Electl. Cas. 199; *Hoyt v. Southern New England Teleph. Co.*, 60 Conn. 388; *Poston v. Cumberland Teleg. & Teleph. Co.*, 94 Tenn. 696, 5 Am. Electl. Cas. 203; *Postal Teleg. Co. v. Lenoir*, 107 Ala. 640, 18 So. Rep. 266, 6 Am. Electl. Cas. 167, note; *Postal Tel. Co. v. Brantley*, 107 Ala. 683, 18 So. Rep. 321; *Bradley v. So. New England Teleph. Co.*, 66 Conn. 559, 34 Atl. Rep. 499, 6 Am. Electl. Cas. 152; *O'Connor v. Nova Scotia Teleph. Co.*, 22 Canada Sup. Ct. Rep. 276; *Gilchrist v. Dominion Teleg. Co.*, Sup. Ct. New Brunswick, 3 Pugsley & Burridge, 553, affirmed Supreme Court Canada, 2 Am. Electl. Cas. 298, note.—E. Q. K.

 M. W. KRUEGER ET AL. V. WISCONSIN TELEPHONE COMPANY.

Wisconsin Supreme Court, February 27, 1900.

(106 Wis. 96.)

TELEPHONE LINE.—ADDITIONAL SERVITUDE.

The erection of telephone poles and wires in a street constitutes an additional burden for which the abutting owners are entitled to compensation, the legislature having power only to grant the right to use streets subject to the rights of the owners of the fee.

Where a pole is placed in front of the property of an abutting owner in such a manner as to interfere with his proper enjoyment thereof, and without his consent, he is entitled to damages and to the removal of said pole.

Cases of this series cited in opinion: *Zehren v. Milwaukee Elec. Ry. & Lt. Co.*, vol. 7, p. —; *Wisconsin Teleph. Co. v. Oshkosh*, vol. 1, p. 687; *Pierce v. Drew*, vol. 1, p. 571; *Irwin v. Gt. So. Teleph. Co.*, vol. 1, p. 709; *Cater v. N. W. Teleph. Exch. Co.*, vol. 5, p. 111; *Julia Bdg. Ass'n v. Bell Teleph. Co.*, vol. 1, p. 801; *People v. Eaton*, vol. 5, p. 87; *Hershfield v. Rocky Mt. Bell Teleph. Co.*, vol. 4, p. 73; *Magee v. Overshiner*, vol. 7, p. 241; *Eels v. Am. Teleph. & Tel. Co.*, vol. 5, p. 92; *Bd. of Trade Tel. Co. v. Barnett*, vol. 1, p. 565; *Am. Teleph. & Tel. Co. v. Pearce*, vol. 3, p. 169; *W. U. Tel. Co. v. Williams*, vol. 3, p. 184; *Ches. & Pot. Teleph. Co. v. Mackenzie*, vol. 3, p. 196; *Blashfield v. Empire St. Teleph. & Tel. Co.*, vol.

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6, p. 126; *Smith v. Tel. Co.*, vol. 2, p. 237; *Pac. Postal Tel. Cable Co. v. Irvine*, vol. 4, p. 140; *Nicoll v. N. Y. & N. J. Teleph. Co.*, vol. 7, p. 277; *Hewett v. W. U. Tel. Co.*, vol. 2, p. 222; *Halsey v. Rap. Trans. St. Ry. Co.*, vol. 3, p. 283; *Broome v. N. Y. & N. J. Teleph. Co.*, vol. 2, p. 259; *Jaynes v. Omaha St. Ry. Co.*, vol. 7, p. —; *City of Richmond v. So. Bell Teleph. & Tel. Co.*, vol. 7, p. —.

Appeal by plaintiff from judgment of Circuit Court, Winnebago County, dismissing complaint.

The defendant is a corporation owning and operating a system of telephones and telephone exchanges in this State. In 1882 the city of Neenah, by ordinance, granted the defendant the right to erect and maintain a telephone system in said city. By it the company was granted the right of way through and upon the "streets, sidewalks, alleys and public grounds of the city, for the use of poles and the necessary wires, provided the same were set in such manner as not to interfere with public travel or the flow of water in the gutters, the point of location to be determined under the direction of the street commissioner or city engineer." The system was erected and continued in operation until April, 1895. As originally located, there was a pole about 12 feet north of the corner of Cedar and Wisconsin streets. An increase of business necessitated a reconstruction of the system. In the progress of the work, it was deemed desirable to change the location of some of the poles, and in making such changes this controversy arose. The complaint sets out that the plaintiffs are the owners of a tract of land having a frontage of 20 feet on Wisconsin avenue, and 77 feet on Cedar street, exclusive of streets. Upon this tract was located a large store building, occupied as a drug store, in the corner of which were large glass windows and doors, looking out upon both streets. In April, 1895, the defendant, without the consent and against the protests of the plaintiffs, set a large pole at the street corner, a few feet from the corner of the drug store, and immediately in front of the show windows, which, it is alleged, materially incumbers said property, and obstructs the view from said store; that it was so set without authority from

the city, and against the protest of the mayor and street commissioner; that such pole and the wires thereon are a nuisance, and greatly interfere with the proper use and enjoyment of plaintiff's property; that defendant insists upon the right to occupy and hold possession of said premises adversely to plaintiffs, and against their will, and without making any compensation therefor. The relief demanded is for damages, a removal of the pole, and a restraining order against its future maintenance. The answer sets up the incorporation of defendant, its business, the payment of license fees as required by law, the building of telephone systems throughout the State, the erection of the exchange at Neenah in 1882, the erection of the pole 12 feet north of the intersection of said streets, the width of the street, acquiescence by plaintiffs in the location of said pole, the reconstruction of the system in 1895, the erection of the pole in dispute at the point designated by the street commissioner, its necessity at that place for the proper management of its exchange, its existence at that point since 1895, and a denial that the poles or wires interfere with the means of ingress or egress from said premises, or obstruct or hinder the uses thereof. When the case was called for trial the defendant asked the court to require the plaintiffs to elect whether they relied upon a legal or equitable cause of action. The request was denied, and a jury was duly impaneled. A special verdict was returned, substantially as follows: (1) That the pole, as at present located, was not an obstruction to the ordinary use of the street. (2) That the cables and wires attached to the pole interfered with the plaintiffs' use and enjoyment of their property. (3) That the pole was a damage to plaintiffs' property. (4) That the pole decreased the rental value of such property. (5) That up to the commencement of this action the plaintiffs' damage was seven dollars. (6) That the street commissioner did not consent to the placing of the pole where it now stands. (7) That the pole could have been placed at some other point without great inconvenience to defendant. (8) That the plaintiffs did

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not refuse to permit the placing of the pole on the west side of Cedar street, seven feet north of the lot line of Wisconsin avenue. (9) That plaintiffs objected to the placing of the pole where it was put. (10) That the erection of the pole at some other point was practicable. (11) That the erection of the pole at any other point would not have been according to the most approved plan of telephone construction. "Not for Telephone Co." (12) That the pole could not have been erected on Cedar street, seven feet north of the south line of plaintiffs' building, and connected with the line running west on Wisconsin avenue, without carrying the wires over plaintiffs' building.

The plaintiffs moved to amend the special verdict by striking out the negative answers to the first, eleventh and twelfth questions, and substituting an affirmative answer, which was denied. A motion for judgment for plaintiffs on the verdict as rendered was also denied. The court took the matter under consideration, and, in a written opinion, decided that the action was equitable, and the verdict only advisory; that the pole in question was not a nuisance; that the placing of such poles in a street was not an additional burden upon the land which entitled adjoining owners to compensation; and that, although they might occasion some damage to abutting lot owners, it was *damnum absque injuria*. Judgment dismissing the complaint, with costs, was entered, from which plaintiffs have taken this appeal.

J. C. Kerwin, for appellants.

Miller, Noyes, Miller & Wahl, for respondent.

BARDEEN, J. (after stating the facts): The importance of this litigation is manifest. It involves the vexed question of whether the placing of telephone poles in a street is an additional servitude, as against the abutting owner, not contemplated by the dedication, that cannot be imposed without his consent, nor without compensation if he requires it. This precise question has not heretofore been declared by this court, so we are free to

deal with it as one of first impression, except in so far as the policy of the State has been dictated in decisions where kindred questions have been considered and determined. That the question should not have been presented before, in view of its importance, and the number and character of the telephone exchanges in the State, is, perhaps, a matter of some surprise. Its importance lies not so much in the individual interests at stake, as in its effect upon the interests of corporations that have built so many miles of poles, and operated so many exchanges, within the borders of the State. In whatever light it may be viewed, it is not entirely free from difficulty. The question has arisen in many of the States, and adjudications upon both sides are numerous, and not without helpful value. The best legal thought of the country has been given to its consideration, and there is little that has been left unsaid. Both sides of the controversy have been presented by eminent counsel, and considered by learned and able judges; and the result has been, as before stated, a considerable diversity of opinion. Kindred questions have heretofore arisen in this State, and while, perhaps, the decisions have not been in complete harmony with the basic idea of street dedication, it is not believed that there has been any radical departure therefrom.

The fundamental idea of street dedication is that the land so dedicated is to be set apart to the entire public for such public use and purposes as the location of the street, urban or suburban, seems to require. The primary use and purpose is public travel. The servitude imposed on the land is the right of the public to construct and maintain thereon a safe and convenient roadway, which shall at all times be open and free for public use as a highway. There is, however, an essential and well-recognized difference between urban and suburban servitudes. The easement of the one is much more comprehensive than the other. Many of the rules which apply to the one class of easements are wholly without force as against the other class. Elliott, Roads & S. 299. This distinction is here referred to in

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view of the contention made by defendant's counsel hereinafter to be noticed. We may further premise our discussion with the statement that it is the settled law of this State that the owner of land abutting on a street owns the fee to the center of the street, subject only to the public easement. The doctrine was first announced in *Gardiner v. Tisdale*, 2 Wis. 153, and has been followed in a line of decisions since almost as numerous as the published volumes of Reports. This being so, this court held in *Ford v. Railroad Co.*, 14 Wis. 609, that the railroad company could not appropriate and occupy a street with its track without consent of the proprietors of the lots bounded by the street, or compensation made to them, and neither the legislature nor the municipal authorities have any power to dispense with the making of such compensation. See *Blesch v. Railway Co.*, 48 Wis. 168, 2 N. W. 113; *Buchner v. Railway Co.*, 60 Wis. 264, 19 N. W. 56; *Hegar v. Railway Co.*, 26 Wis. 624. The reason given for this conclusion as stated in the *Ford Case* is that "the two uses are almost, if not wholly, inconsistent with each other, so that taking the highway for a railroad will nearly supersede the former use to which it had been legally appropriated." In *Hobart v. Railroad Co.*, 27 Wis. 194, the question was raised whether the construction and operation of a horse railway in the streets of a city imposed a new burden upon the adjacent lot owners, for which they were entitled to compensation. There were conflicting decisions in other States, and the court adopted a middle doctrine, sanctioned by the courts of Ohio—that such a road was not an additional burden entitling the lot owners to compensation, except when some private right of such owner, such as free access to his own land or buildings, has been materially impaired thereby. Reasons at length are not given in the opinion for this conclusion, but it is evident that it cannot be justified except upon the theory that the street railway tends to further and accelerate the original purpose for which the dedication was made—that of public travel. In the recent case of *Chicago & N. W. Ry. Co. v. Milwaukee, R. & K.*

E. Ry. Co., 95 Wis. 561, 70 N. W. 678, 37 L. R. A. 856, this court held that the construction and operation on public streets, of an electric railroad extending between several cities or towns, for the transportation of merchandise, baggage, mail and express matter, as well as passengers, is not a mere exercise of the public easement previously acquired by the establishment of such street, but imposes an additional burden thereon, and is the taking of private property, for which the abutting owner is entitled to compensation. Emphasis was laid upon the fact that it was a commercial railway, doing other business than the mere transportation of passengers, and also that the communication was between somewhat distant cities. This case was followed in *Zehren v. Light Co.*, 7 Am. Electl. Cas. —, 99 Wis. 83, 74 N. W. 538, 41 L. R. A. 575, but the doctrine was extended so far as to hold that an electric railway running upon the highway through country towns was an additional burden upon the highway. The question of whether such a system, operated by the overhead trolley, with its necessary poles, in the streets of the city, was an additional burden, was expressly reserved, and has not yet been determined in this State. The rights of the abutting lot owner with reference to the adjacent street has received consideration in several cases. Thus, in *Papworth v. City of Milwaukee*, 64 Wis. 389, 25 N. W. 431, the right of the lot owner to construct vaults or other areas under a sidewalk, with proper openings therein, was sanctioned, provided it was done in such a manner as not to interfere with or endanger public travel. In *Hay v. Weber*, 79 Wis. 587, 48 N. W. 859, a bay window extending over the sidewalk in such a way as not to interfere with travel was permitted. The fair conclusion from this line of decisions is that the abutting owner has all the rights of an absolute owner of the soil, in the streets, subject only to the public easement therein.

It may be admitted that the constitution of the State is the only limit of legislative power over the highways of the State. The lines within which such power is to be restrained are such

as were indicated in the Ford Case—that neither the legislature nor municipal authorities can authorize the taking or incumbering of a public street for purposes inconsistent with its public use, without the consent of the lot owner, unless some provision for compensation has been made. The extent to which legislative authority may go would be to grant the right of street occupancy, subject to the rights of the owners of the fee. This, it is believed, is all that was intended, and all that the legislature had the right to grant, by the act of the legislature of March 11, 1848. See Terr Laws 1848, p. 257. This act gave the right to telegraph companies to construct and maintain their lines “from point to point, upon and along any of the public roads . . . within the limits of the Territory or State, or upon the land of any individual, the owners of the land through which said telegraph lines may pass having first given their consent,” provided the same should be so constructed as not to incommode public use. This law, with some slight amendments, has been carried into the different revisions since that time, and now appears in the revision of 1898 as section 1778. While limited in its terms to telegraph companies, this court held in *Wisconsin Tel. Co. v City of Oshkosh*, 1 Am. Electl. Cas. 687, 62 Wis. 32, 21 N. W. 828, that the telephone company was included within the meaning of the statute. It should be noted, however, that the Supreme Court of the United States in a recent case came to a different conclusion regarding an act of Congress of similar import. *City of Richmond v. Southern Bell Telephone & Telegraph Co.*, 174 U. S. 761, 19 Sup. Ct. 778, 43 L. Ed. 1162. As before noticed, it is our conviction that this law grants no powers to use the street, except as against the public, and was not intended to cut off or limit the rights of the actual owners of the land affected thereby. Without authority from the State, the placing of poles in a street would constitute a nuisance, abatable as such by the public authorities. By this statute the public is foreclosed of the right to object to the poles being in the street; but the right of the adjacent owner remains

intact, to be vindicated, when invaded, by the usual process of the law. The fact that the power of eminent domain has not been granted to telegraph or telephone companies cannot affect the question. It may be that the companies have not asked for it. The fact that the question has not been brought here before is of no significance, except as indicating how great has been the forbearance of parties whose rights have been invaded. The argument that whenever a highway has been laid out since 1848 the compensation paid therefor included the use telephone companies might put it to is specious, but in reality overlooks some very important considerations. In the first place, there is no kinship between the statutes in relation to the taking or dedication of highways and the one in question. They do not relate to the same subject-matter, nor, in their purpose, do they concern the same class of people. In the one case a right is given to the entire public; in the other, to a few corporations doing a special business, for private gain. The one contemplates only such occupancy as is essential and necessary for the purposes of public travel. The other grants a right of permanent occupancy to a private corporation, conducted for private gain, but doing a business of public utility and convenience. A street may subsist, and the lot owner have the complete use of his adjacent property. Not so if a portion of the street has been permanently taken by poles and other necessary structures for a telegraph or telephone line. No one doubts but that private rights are affected, by the construction and maintenance of such a line, in a way entirely different from the ordinary uses of a highway. Nor is there room to dispute the fact that such constructions constitute a permanent occupancy of the land, independent of the public use. This occupancy being for the direct benefit of private corporations, and only for the indirect benefit of the public, how can it be said, with any show of justice, that when land is condemned for a street the public must not only pay for its use, but also for the use of such quasi public corporations as the legislature have given power to use the highways? There is

also another consideration. In no case that has ever come under our observation, where land has been sought to be condemned, has the fact that the street might be used by a telegraph or telephone company been urged as an element of damages. There are thousands of miles of streets and highways in the State where no telephone poles have ever been set, and where none ever will be set, and it would be absurd to say that the owners of the fee ever contemplated payment for any other use than that of public travel. There is no parallel between this case and *Huston v. City of Ft Atkinson*, 56 Wis. 350, 14 N. W. 444. The court there asserts that materials in one portion of a highway might be taken to repair an adjacent highway, the purpose being in aid of the public use. Streets have to be made and worked, hills leveled and depressions filled. Hence it may be said to have fairly been within the contemplation of the parties that the surface should be removed from place to place to carry out the original idea of street-making.

On the general proposition of whether wires and poles are an additional burden for which the abutting owner is entitled to compensation, there is, as stated, a wide divergence of opinion among text writers and courts. It is universally admitted that the legislature may subject the highway to this use. The question is whether it can be done without compensation to the owner of abutting land. As stated in *Keasbey, Electric Wires*, p. 71, the argument on one side is that the easement of highway is intercommunication, or the right to use the highway by the public generally for the purposes of intercommunication. Its purpose has been the transmission of intelligence, as well as for travel and transportation. It has been used by the post horse and mail wagon as well as the coach and the cart. When new modes of travel and new means of communication became necessary, the public have a right to use them, and they impose no new burden on the soil unless they are inconsistent with the old use; and, if the old use remains unimpaired, the owner of the soil has no reason to complain. Some of the leading cases sup-

porting this view are here noted: *Pierce v. Drew*, 1 Am. Electl. Cas. 571, 136 Mass. 75; *Irwin v. Telephone Co.*, 1 Am. Electl. Cas. 709, 37 La. Ann. 63; *Cater v. Exchange Co.*, 5 Am. Electl. Cas. 111, 60 Minn. 539, 63 N. W. 111, 28 L. R. A. 310; *Julia Bldg. Ass'n v. Bell Tel. Co.*, 1 Am. Electl. Cas. 801, 88 Mo. 258; *People v. Eaton*, 5 Am. Electl. Cas. 87, 100 Mich. 208, 59 N. W. 145, 24 L. R. A. 721; *Hershfield v. Telephone Co.*, 4 Am. Electl. Cas. 73, 12 Mont. 102, 29 Pac. 883; *Mages v. Overshiner* (Ind. Sup.), 7 Am. Electl. Cas. 241, 49 N. E. 951, 40 L. R. A. 370. On the other hand, it is argued that the streets were intended primarily for travel and transportation, and that, although they were intended also for the transmission of intelligence, and the telephone and telegraph are used for that purpose, yet the mode of use is so wholly different from the old one, and requires such permanent occupation of the soil, that it cannot be supposed that the landowner ever contemplated such use and occupation. He has only given the right of use for a public highway, and, if he cannot complain of this permanent occupation, there is nothing to prevent the posts being put so as to form a barrier between his land and the street, and the wires from being so numerous as to be annoying and dangerous. The primary law of the highway is motion, and whether vehicles are used, or whatever method of transmission of intelligence is adopted, the vehicle must move and the intelligence be transmitted by some moving body which must pass along the highway, either on or over, or perhaps under, it, but cannot permanently appropriate any part of it. The authorities supporting this view are so numerous that it may be said with confidence that the great weight of judicial opinion is in its favor. We note the following cases: *Eels v. Telegraph Co.*, 5 Am. Electl. Cas. 92, 149 N. Y. 133, 38 N. E. 202, 25 L. R. A. 640; *Telegraph Co. v. Barnett*, 1 Am. Electl. Cas. 565, 107 Ill. 507; *Telegraph-Cable Co. v. Eaton*, 170 Ill. 513, 49 N. E. 365, 39 L. R. A. 722; *Telegraph Co. v. Pearce*, 3 Am. Electl. Cas. 169, 71 Md. 535, 18 Atl. 910, 7 L. R. A.

200; *Telegraph Co. v. Williams*, 3 Am. Electl. Cas. 184, 86 Va. 696, 11 S. E. 106; *Telephone Co. v. Mackenzie*, 3 Am. Electl. Cas. 196, 74 Md. 36, 21 Atl. 690; *Blashfield v. Telegraph Co.*, 6 Am. Electl. Cas. 126, 71 Hun, 532, 24 N. Y. Supp. 1006; *Smith v. Telegraph Co.*, 2 Ohio Cir. Ct. R. 259; *Stowers v. Telegraph-Cable Co.*, 68 Miss. 559, 9 South. 356, 12 L. R. A. 864; *Telegraph Co. v. Irvine*, 4 Am. Electl. Cas. 140 (C. C.), 49 Fed. 113; *Nicoll v. Telephone Co.* (N. J. Err. & App), 7 Am. Electl. Cas. 277, 42 Atl. 583; *Hewett v. Telegraph Co.*, 2 Am. Electl. Cas. 222, 13 Wash. Law Rep. 466. See *Halsey v. Railway Co.*, 3 Am. Electl. Cas. 283, 47 N. J. Eq. 380, 20 Atl. 859; *Sterling's Appeal*, 111 Pa. St. 35, 2 Atl. 105; *Broome v. Telephone Co.*, 2 Am. Electl. Cas. 259, 42 N. J. Eq. 141, 7 Atl. 851; *Jaynes v. Railway Co.* (Neb.), 7 Am. Electl. Cas. —, 74 N. W. 67, 39 L. R. A. 751. In addition to the courts the text writers quite uniformly subscribe to this doctrine. Mr. Lewis, in his work on Eminent Domain (sec. 131), says: "The lines of a telegraph or telephone company are on the same footing as the steam railroad. They form no part of the equipment of a public highway, and are entirely foreign to its use." Another writer on this same subject says: "And the sounder rule seems to be that the abutting owner ought to be compensated for all actual injury to his property, or the right to use the same. Tied. Mun. Corp. sec. 297. Randolph on Eminent Domain (sec. 407), says that the prevailing opinion is that the plant of a telegraph or telephone company is an additional servitude. See, also, *Crowsw. Elect.* sec. 110; *Thomp. Elect.* sec. 18; *Elliott, Roads & S.* pp. 534, 535; 2 *Dill. Mun. Corp.* sec. 698a. In view of this overwhelming array of courts and law writers in favor of the latter rule, and in view of the adoption by this court of the middle-ground doctrine mentioned in the *Hobart Case*, we feel compelled to drop into the ranks of the majority, and sanction this rule as the policy and law of this State. Every question and every argument bearing on the situation has been raised and used, and considered and determined,

in the cases cited; and nothing that we can say will add to their weight, or be likely to convince the doubting. The suggestion that the adoption of this rule will cripple or destroy the commerce of the State is weighty, but the rights of the public or of corporations engaged in conducting business of a public character, cannot be allowed to prevail over the rights of individuals, except in the way pointed out in the constitution. The fact that some of the cases mentioned were decided with reference to the location of poles on country roads does not lessen their weight. If it be a fact, as we believe it is, that in the dedication or condemnation of streets the taking and occupancy of a specific portion for permanent structures was not within the contemplation of the parties, then the argument of the greater rights of the public in city streets fails. The freedom of use and enjoyment of adjoining property have been interfered with, and a definite portion of both street and highway has been taken, contrary to the original purpose, and without compensation.

On the trial the complaint was objected to as having a double aspect. It was claimed that it contained allegations which would make the action either at law or in equity, to suit the exigencies of the pleader; and the court was asked to compel the plaintiffs to elect as to which aspect of the case they intended to adopt. This request was denied, and the case was submitted to a jury, and a special verdict taken. Afterwards the court became convinced that the suit was one in equity, regarded the findings of the jury as advisory only, and judgment was ordered for defendant, mainly on the theory that the pole in dispute did constitute an additional burden on the street. Without entering into any formal discussion of the matter, we shall assume, as counsel for both parties and the court have assumed, that the action is one in equity to abate a private nuisance, under chapter 187, Revised Statutes. The proof amply shows that defendant entered upon the plaintiffs' land, and erected an unsightly pole immediately in front of their show window, and which in

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some degree interferes with the proper enjoyment of their property. Such occupancy constitutes a continuing trespass upon the land, and affords grounds for the intervention of the court. In view of what has already been said, the decision of the trial court was erroneous. The judgment is therefore reversed, and the cause is remanded, with directions to enter judgment for the plaintiffs for the removal of the pole, and for the damages found by the jury. So ordered.

WILLIAM D. PALMER, Respondent, v. LARCHMONT ELECTRIC
COMPANY, Appellant.

New York Court of Appeals, February 28, 1899.

(158 N. Y. 231, reversing 6 Am. Electl. Cas. 128.)

ELECTRIC LIGHT LINE FOR PUBLIC LIGHTING IN RURAL HIGHWAY.—NO NEW
BURDEN.

The owner of rural land, abutting upon a highway to the center of which his ownership extends, is not entitled to compensation for the use of the highway for its fixtures by an electric light company duly organized under the Transportation Corporations Law, using the highway under a grant from the town authorities, which grant embodies a contract for public lighting; the particular fixtures in question being necessary to the performance of such contract.

The case distinguished from the *Hels Case* (5 Am. Electl. Cas. 92), since in that case the telephone line in question was not used for any street purpose, while lighting is a street purpose.

Street purposes and municipal purposes distinguished.

Cases of this series cited in opinion: *Johnson v. T. H. Elec. Co.*, vol. 3, p. 203; *Consumers Gas & Elec. Lt. Co. v. Congress Spring Co.*, vol. 3, p. 211; *Hels v. Am. Teleph. & Tel. Co.*, vol. 5, p. 92.

Appeal from judgment of Appellate Division of Supreme Court, Second Judicial Department, affirming a judgment entered upon a decision of the court on trial at Special Term. Facts stated in opinion.

Wm. Sam. Johnson, for appellant.

Wm. Porter Allen, for respondent.

HAIGHT, J.: This is an action in ejectment to compel the defendant to remove its poles and wires from Palmer avenue in front of the plaintiff's premises. The plaintiff is the owner of lands at the corner of Palmer and Rushmore avenues in the town of Mamaroneck, Westchester county, and his fee extends to the center of the highways, subject to the easements of the public therein. The defendant is an electric corporation organized under the Transportation Corporations Law of this State (L. 1890, ch. 566), having for its objects the manufacture and use of electricity, for producing light, heat and power, and in lighting streets, avenues, public parks and places and public and private buildings of cities, villages and towns within this State. On the 14th day of March, 1894, it obtained a grant from the town board of the town of Mamaroneck, giving it the right to construct and maintain suitable lines of wire for the purpose of conducting electricity to such points within the corporate limits of the town as may seem fit to the company, subject, however, to certain rules and restrictions specifically mentioned, among which were the requirements that the wires should be insulated, conducted upon poles of a specified size and uniformity, made straight and attractive in appearance, on which wires should be strung not less than eighteen feet from the ground. The grant contained the further condition that the company shall furnish to the town \$100 worth of light free of charge each and every year, and for every \$1,000 worth of light bought by the town from the company an additional \$100 worth of free light shall be furnished, the light to be placed in such locations as shall be designated by the town board. Pursuant to this grant the town contracted for certain lights at the rate of \$22.50 per light per year, and thereupon, pursuant to the grant and contract, the defendant constructed its line of wire through Rushmore and Palmer avenues, locating a light on the

corner of those avenues in front of plaintiff's premises, and erected on Palmer avenue, in front of his premises, two poles on which the wires were strung, and which the evidence shows were necessary to enable the company to perform its contract with the town.

This action was prosecuted to recover the possession of the lands occupied by these poles and for damages.

The care, management and control of the public ways devolve upon the local municipal government in which they are located, and it is the duty of the local government to maintain them in such condition that the public, by the exercise of due care, may pass over them in safety. In the darkness of the night, in crowded thoroughfares, light is an important aid, largely tending to promote the convenience, as well as the safety, of the traveling public. It is not only one of the uses to which the public ways may be devoted, but in the case of crowded thoroughfares a duty devolves upon the municipality of supplying it. In such cases it is one of the burdens upon the fee which must be borne as an incident to the public right of traveling over the way, and is deemed one of the uses for which the land was taken as a public highway. *Johnson v. Thomson-Houston El. Co.*, 3 Am. Electl. Cas. 203, 54 Hun, 469; *Consumers' Gas & El. L. Co. v. Congress Spring Co.*, 3 Am. Electl. Cas. 211, 25 J. & S. 553; *Witcher v. Holland Water Works Co.*, 66 Hun, 619; *Same Case*, affirmed, 142 N. Y. 626; *Hequimbouurg v. City of Dunkirk*, 49 Hun, 550; *Sun Pub. Co. v. Mayor, etc.*, 152 N. Y. 257, 265; *Van Brunt v. Town of Flatbush*, 128 N. Y. 50, 56.

As we understand the opinion of the learned court below, its views are in accord with our own, as applied to public highways in cities and incorporated villages, but it reached the conclusion that the rule was different with reference to country highways, and that the density of population ought not to be made the test in determining the line in respect to easements which separate the urban from the rural districts. (6 App. Div. 12.) That court was also of the opinion that this case was

controlled by the case of *Eels v. Am. Tel. & Tel. Co.*, 5 Am. Electl. Cas. 92, 143 N. Y. 133.

Our views are somewhat different. We think the *Eels Case* is clearly distinguishable from that under consideration. In that case ejectment was brought to remove the poles of a telegraph and telephone company which were not used in any sense for a street purpose. It is urged that the wires might be used for the purpose of notifying the fire department of a municipality of the breaking out of a fire. Undoubtedly, and so far as they are used for that purpose, it clearly would be for a municipal purpose, but there is a broad distinction between a municipal purpose and a street purpose. The primary object of highways is for the public travel by persons and animals, and by carriage or vehicles used for the transportation of persons and goods, other than by railroads. Sewers drain the surface water from the highways, and thus relieve them from impairment and destruction. In this respect sewers are for a street purpose. In addition, they may drain also the abutting property and houses and thus tend to promote the public health. In this respect they are for a municipal purpose. Water supplied by mains through the highways may be used for cleansing and sprinkling the streets. In this respect it is for a street purpose. It may be used by the abutting owners for cleansing and for domestic purposes, and is also used for the extinguishment of fires. In this respect it for a municipal purpose. Light is, as we have seen, an aid to the public in the night time in traveling upon the highway. It is, therefore, used for a street purpose. All of the street purposes which we have referred to are clearly incident to the highway and are deemed within the grant of lands for highway purposes whenever the necessity for these uses arises. Not so with telegraph and telephone wires. They in no way preserve or improve the streets or aid the public in traveling over them.

We are thus brought to a consideration of the difference between urban and rural streets. That there is a distinction

between such streets has long been recognized by the authorities, but a careful examination of the cases discloses the fact that the distinction arises out of the necessary requirements of the public in the use made of them.

Dillon, in his work upon Municipal Corporations (vol. 2, sec. 688), says: "In the author's judgment, the uses to which streets in towns and cities may legitimately be put are greater and more numerous than with respect to ordinary roads or highways in the country. With reference to these all the public requires is the easement of passage and its incidents, . . . but, with respect to streets in populous places, the public convenience requires more than a mere road to pass over and upon them. They may need to be graded and brought to a level, and, therefore, the public or municipal authorities may not only change the surface but cut down trees, dig up the earth, and may use it in improving the street or elsewhere, and may make culverts, drains and sewers upon or under the surface." This same distinction was made in *Matter of the Petition of the Bloomfield & Rochester Natural Gas Light Co. v. Calkins* (62 N. Y. 386), in which it was held that a gas light company could not lay its pipes in a country highway without compensation to the owner of the abutting land, where its pipes were not used for the lighting of the highway through which the company sought to lay its pipes. But the owner of the fee in a country highway, taken, opened and dedicated for a public use, is entitled to no further compensation after the territory has become thickly settled and the highway has become a street of an incorporated city. This was recognized in the *Eels Case*, and it is, therefore, apparent that, at the time the land was taken for a highway, it was impliedly dedicated to the uses which the public might in the future require. Light may not be necessary in an ordinary country highway, and yet there may be country roads in which the travel is so great as to make light a necessity in order to avoid collisions and injuries in the night time. The inhabitants of our large cities are in a measure supplied with

food and other necessities of life from the surrounding country. Scarcely a city can be named in which there will not be found one or more great public highways leading into the country, which, day and night, are thronged with teams transporting the produce of the farm to the markets of the city. Towns, in some instances, have recognized the public necessity, and have caused some of these thoroughfares to be lighted. In many of our towns there are villages of considerable size remaining unincorporated, in which lights in the street would be of great convenience and materially add to the safety of the public. May not towns properly supply these streets and thronged highways with light? If they may, they may properly contract with others to supply the light. The court below appears to have feared trouble with reference to the determination of the question of the necessity for light by the courts, and thought that each case would have to be determined on its own facts, and that the decision in each would vary with the varying minds and judgments of the courts and petit jurors, but we apprehend no difficulty in this regard. We think that question should be left to the determination of the parties specified by the statute. Indeed, it appears to us that the question under discussion is entirely controlled by the statute. The statute not only authorizes the incorporation of companies for supplying gas for the lighting of streets in cities, towns and villages, but it also authorizes the incorporation of companies for the manufacturing and supplying of electricity for lighting streets, avenues, public parks and places in cities, villages and towns. It then provides that such corporations using electricity for light, heat or power may carry on the business of lighting "by electricity or using it for heat or power in cities, towns and villages within this State, and the streets, avenues, public parks and places thereof, and public and private buildings therein; and for the purposes of such business to generate and supply electricity . . . and to lay, erect and construct suitable wires or other conductors, with the necessary poles, pipes or other fixtures in, on,

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over and under the streets, avenues, public parks and places of such cities, towns or villages, for conducting and distributing electricity, with the consent of the municipal authorities thereof, and in such manner and under such reasonable regulations, as they may prescribe." (Transportation Corporations Law, secs. 60, 61.) The Town Law provides that a town is a municipal corporation comprising the inhabitants within its boundaries. (Sec. 2.)

It will be observed that no distinction is made by the statute between cities, towns and villages; that a corporation, organized under the provisions of the act, may, with the consent of the municipal authorities, under such reasonable regulations as they may prescribe, construct suitable wires or other conductors with the necessary poles, pipes or other fixtures in, on, over and under the streets, etc., of the town as well as that of the city or an incorporated village. Who can better determine the necessity for light in a highway than the inhabitants of the town through which it runs? Shall the courts assume the prerogative of saying that a town shall or shall not have light, when the statute provides that its municipal authorities shall determine the question? No citizen of the town is here complaining with reference to the action of the municipal authorities of the town of Mamaroneck in contracting with the defendant for light. If these town officers have exceeded their authority and wasted the public moneys the courts are open to correct the abuse and prevent the waste in a suit by a taxpayer; but no such person is here complaining of the action of the town authorities. The plaintiff is not complaining of the contract or of the supplying of his premises with light. He is seeking compensation for the ground occupied by the poles of the company in the highway in front of his premises. The authorities of his town having determined the necessity for the light and contracted with the defendant to furnish it, and the light being for a street purpose, we think no burden is placed upon the fee that was not within

the implied contemplation of the parties at the time the land was taken and dedicated to highway purposes.

Our conclusion is supported by authority. In the case of *Van Brunt v. Town of Flatbush* (128 N. Y. 50), EARL, J., refers to the question we have had under consideration in discussing the right to construct a sewer in the town of Flatlands. He says: "If the legislature had authorized a system of sewerage in the town of Flatlands for the convenience, health and welfare of the inhabitants of that town, and this sewer had been projected with lateral sewers, with the privilege of the owners of adjacent lots to connect their lots therewith, then we are inclined to believe, for reasons we need not now state, that the character of the avenue and of the locality was such and the population is such that the sewer could be built in the avenue without the consent of the fee owners and without compensation to them."

In the case under consideration, as we have seen, the legislature has authorized the municipal authorities of the town to contract for the providing of light for street purposes.

Again, in the case of *Witcher v. Holland Water Works Co.* (66 Hun, 619), an action was brought by an abutting owner to recover the possession of lands in a public highway, occupied by the defendant with water pipes and a hydrant. The village of Holland was unincorporated; a water pipe had been laid through the highway and hydrants had been established, from which the water might be taken for street purposes. It was held, in the General Term, that there was a public necessity for the water, and that it being for street purposes the plaintiff was not entitled to recover, and that conclusion was affirmed in this court. (142 N. Y. 626.) And in the case of *People ex rel. Woodhaven Gas Light Co. v. Deehan* (153 N. Y. 528) we held that a grant by the authorities of a town to a gaslight company to lay conductors for conducting gas through the public highways of the town was valid.

There is no question of public policy that is adverse to our

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contention. It may be that the owners of the fee in highways should not be burdened with sewers, conductors or wires, in which they have no interest or right to use, but which are intended for the use of other localities; but sewers, conductors and lighting wires intended for the use, benefit and improvement of the highway through which they pass, and of the abutting owners thereon, which promote the comfort and safety of the traveling public, stand upon a different footing and impose no burden upon the fee not intended by the grant for highway purposes. It may be that some prejudice exists against wires strung on unsightly poles, but the statute empowers the citizens of the locality, through their duly constituted authorities, to determine the manner and the regulations in and under which the wires should be constructed. They may specify, as was done in this case, the character of poles that shall be used, or they may require that the wires shall be placed in conduits under ground. The whole matter is left to their judgment and discretion. If the people of a town want light in their highways and are willing to pay for it, no reason is apparent, founded upon public policy, morals or law, why the courts should interfere to prevent it. If the highway be but a country road, lightly traveled, and no necessity exists for a light, then a taxpayer has a right to object, but, until such objection is made, we think it may fairly be assumed that the necessity for the light exists. The statute has given to the authorities of a town the power to determine whether they will have light. The question of necessity must, in the first instance, be determined by such authorities, and in this case no person is in court seeking to review the determination made by the authorities of the town of Mamaroneck in contracting with the defendant.

The judgment should be reversed and a new trial granted, with costs to abide the event.

All concur, except MARTIN and VANN, JJ., dissenting.

Judgment reversed, etc.

NOTE.—See note 2 at end of Part II.

WYCKOFF VAN SICLEN and JOHN R. VAN SICLEN, Respondents,
v. THE JAMAICA ELECTRIC LIGHT COMPANY, Appellant.

New York Supreme Court, Appellate Division, Second Department, November, 1899.

(45 App. Div. 1.)

ELECTRIC LIGHT APPLIANCES IN HIGHWAYS.—CUTTING TREES.

A town has authority, in a proper case, to grant a franchise to an electric light company to set poles in highways and to string wires thereon for the purpose of conveying electricity to light the streets and other public places.

But such franchise confers no right upon the company to remove or mutilate trees of an abutting owner, in absence of existing necessity; and if its purpose can otherwise be accomplished, without resorting to extraordinary means, though with inconvenience and greater expense, such necessity does not exist.

Acts of employees of the company, under general directions from its managing agent, to cut such branches from the trees as were required to string the wires and prevent contact, *held*, to bind the company and make it liable for damages caused thereby.

The owners of the trees claimed treble damages for the trespass, under Code Civil Procedure, sec. 1668, to which they were entitled unless the jury was "casual and involuntary." Nothing in pleading or proof indicating such a condition, defendant was not entitled to have the jury charged that they should find as to its existence.

Case of this series cited in opinion: *Palmer v. Larchmont Elev. Co.*, vol. 7. p. 298.

Appeal by defendant from judgment of Supreme Court entered upon a verdict for plaintiffs, and from an order denying a motion for a new trial made upon the minutes.

Henry A. Monfort, for the appellant.

James C. Van Siclen, for the respondents.

HATCH, J.: This action was brought to recover damages for a trespass committed by the defendant in April, 1898, upon the

lands of the plaintiffs. The trespass consisted in entering upon the plaintiffs' lands and mutilating certain trees situate thereon, by cutting off several of their limbs. The action is sought to be maintained as coming within the provisions of sections 1667 and 1668 of the Code of Civil Procedure, treble damages for the injury being demanded in the complaint.

We must assume that the defendant possesses authority to construct and maintain its poles in the highway opposite the plaintiffs' premises, and to string wires thereon for the purpose of conveying electricity for lighting the streets and other public places.

The defendant put in evidence a contract between the town of Jamaica and itself, also a franchise granted to the defendant authorizing it to set poles and string wires in the streets of the town. The contract and franchise are not set out in full in the record, but the statement in what they consisted showed authority to erect poles and string wires. In a proper case the town had authority to make such contract and grant such franchise. *Palmer v. Larchmont Electric Co.*, 7 Am. Electl. Cas. 298, 158 N. Y. 231.

No objection was made by the plaintiffs to the introduction of either the contract or franchise, and no point was made that they were not in all respects sufficient to authorize the defendant to use the streets of the town for the purpose for which it assumed to use them. For the purpose of this appeal, therefore, we must regard the authority to erect the poles and string the wires as being within the franchise granted by the town.

The evidence given upon the trial was sufficient to establish that the defendant, through its manager, substantially directed the places where the poles should be set in the street, and contemplated that there would exist necessity for cutting away the branches of the trees in order to accommodate the wires strung upon the poles and remove them clear of the obstruction created by the branches.

The defendant would have no right whatever to cut or remove

any of the branches of these or other trees upon the lands of another, except it showed an existing necessity therefor in the fulfillment of its contract and the enjoyment of its franchise. There is some testimony in the case which would seem to warrant the conclusion that the poles might have been set so that there would be no necessity for the removal of any of the branches or foliage of the trees, the injury to which is the subject of this action; and if, by the exercise of a reasonable degree of care, they could have been placed and the wires strung so as not to come in contact with the branches of the trees, even though the exercise of such care was not so convenient as the method adopted, the latter consideration would not justify interference with the trees.

It appeared in the testimony that the wires were required to be so placed as not to come in contact with the trees, for the reason that its effect would be the grounding of the wires, loss of current, creating a short circuit, and the killing and destroying in course of time of the tree with which it came in contact. If the defendant could, by the proper insulation of its wires, prevent the escape of electricity therefrom, then these conditions would be obviated; and if such measures were practicable then the defendant would be required to resort to them, even though they were more expensive and less convenient. In other words, the right to touch the trees at all must be justified by an existing necessity, and if the purpose can be accomplished without extreme or extraordinary means, then no right would exist to interfere in any manner with the trees.

These considerations are sufficient to support the finding of the jury that there was an unlawful entering upon the land and an unnecessary mutilation of the trees, constituting the trespass of which complaint is made, within the authority of the sections of the Code to which reference has been had, and that the damages found by the jury are not in measure excessive, giving effect to the testimony bearing thereon.

We have, therefore, little difficulty in supporting this judg-

ment upon the merits. The evidence clearly disclosed the fact that the managing agent of the defendant gave the directions to erect the poles and to cut such branches from the trees as were required to string the wires and prevent contact. His directions in this regard were general, after he had examined the locality, and the agents whom he selected for the performance of the work in all that they did acted within the scope of authority which had been committed to them and in the prosecution of the master's business. The case, therefore, is excluded from the principle which was applied in *Vanderbilt v. The Richmond Turnpike Co.*, 2 N. Y. 479, and is brought within that applied in *Palmeri v. Manhattan R. Co.*, 133 id. 261, and *Lang v. N. Y., L. E. & W. R. R. Co.*, 80 Hun, 275.

The defendant was, therefore, liable for the trespass committed by its agents, as it must be assumed that the entry upon the land and the cutting of the trees was in the prosecution of its business, and was authorized and directed by it. The law of the case, therefore, entitled the plaintiffs to recover.

It is claimed, however, that the judgment must be reversed for errors committed by the learned trial court in the charge to the jury. It is insisted that upon the trial the court was requested to charge the jury in these words: "The jury should find whether or not the injury, if any committed, was casual or involuntary," and that the court refused so to charge, to which an exception was taken. In view of the context in the record it may well be doubted whether the question of law which the request sought to present was called to the attention of the court in such form and manner as to fairly apprise the court of the real nature of the question upon which the defendant desired the court's instruction to the jury. But assuming for the present that there was no fault in this regard, we think that no error was committed by the court in refusing so to charge. Section 1667 of the Code provides: "If any person cuts down . . . any wood, underwood, tree, or timber, or girdles, or otherwise despoils a tree on the land of another, without the owner's leave:

or on the common, or other land, of a city, village or town, without having right or privilege in those lands, or license from the proper officer, an action may be maintained against him by the owner," etc. The following section provides that in an action brought as prescribed in the last section the plaintiff may state in his complaint the amount of his damages and demand judgment for treble the sum so stated; and if a recovery be had of any damages he is entitled to treble the amount, except where the verdict finds affirmatively that the injury for which the action was brought was casual and involuntary, or that the defendant, when he committed the injury, had probable cause to believe that the land was his own. The action, therefore, lies for the entry and spoliation without the owner's consent, unless the exception can be made applicable. In the present case the complaint avers that the entry and the cutting were unlawful, and done without any leave or permission being given by the plaintiffs. The answer, *inter alia*, is a denial, but it contains no averment that the entry or the cutting was casual and involuntary, or that the defendant had probable cause to believe that the land was its own. The proof upon the trial was undisputed that the entry was without consent, and that the cutting was done for the most part, if not all, within the line of the plaintiffs' premises. There was no claim in the answer or proof upon the trial that the cutting was by mistake, or was casual and involuntary. On the contrary, each act, both of entry and cutting, was fully understood, and in this respect there was not even claim of mistake. Consequently, there was no basis, either in proof or pleading, which would have authorized a finding by the jury that the entry and cutting, or either of those acts, was casual and involuntary; and there was, therefore, no basis, either in fact or law, to support the request to charge. It was not necessary to affirmatively plead that the act of which complaint was made was a casual and involuntary act, for, if the proof warranted, the defendant would be entitled to such finding, even though not pleaded. Note to Throop's Code, sec. 1668; *Humes*

Carpenter v. Electric Co.

v. Proctor, 57 N. Y. St. Repr. 284. We only call attention to the fact that no such claim was made to emphasize the fact that no basis existed to support the request to charge.

We have examined the other questions presented and find no error therein.

The judgment should, therefore, be affirmed. All concurred. Judgment and order affirmed, with costs.

NOTE.—See note 2 at end of Part II.

JOHN CARPENTER ET AL V. CAPITAL ELECTRIC COMPANY.

Illinois Supreme Court, February 17, 1899.

(178 Ill. 29.)

ELECTRIC LIGHT LINE IN PRIVATE ALLEY FOR PRIVATE LIGHTING NEW BURDEN.

When an electric light company erects poles or strings wires in a private alley for the purpose of supplying light to private individuals, though the latter be part owners in fee of the alley, an additional burden is thereby imposed upon the land; and the abutting owners may demand compensation and may maintain an action in equity to compel the removal of the poles and wires.

Cases of this series cited in opinion: *Board of Trade Tel. Co. v. Barnett*, vol. 1, p. 565; *Tiffany v. U. S. Illum. Co.*, vol. 1, p. 629; *Haverford Elec. L. Co. v. Hart*, vol. 4, p. 148.

Appeal by plaintiffs from a decree of the Circuit Court of Sangaman county dismissing bill of complaint.

This is a bill filed by the appellants against the appellee, praying that the appellee may be decreed to take down two electric wires and a cross arm stretched and extending over a private alley in the rear of the property of the appellants, in the city of Springfield, and to remove said wires and cross arm from said alley, so as to render the use thereof with the appurtenances by the appellants as the same was used previous to the erection of the said wires and cross arm. The bill was answered by the appellee, and, upon hearing had, a decree was entered by the

Circuit Court dismissing the bill at the cost of the appellants. The present appeal is prosecuted from such decree of dismissal.

The facts, as shown by the pleadings and proofs, are substantially as follows: The appellants herein are the children of one William Carpenter, now deceased. William Carpenter in his lifetime purchased at a judicial sale, held under a decree of the Circuit Court of Sangamon county entered in a certain suit pending therein, certain lots fronting 36 feet on Washington street, in the city of Springfield, and running north 97 feet, and received for said property from the master in chancery of said court two deeds—one dated October 25, 1852, and the other dated December 26, 1855. One of said deeds conveyed a strip 10 feet wide and 97 feet deep, and the other of said deeds conveyed a strip 26 feet wide and 97 feet deep. The deeds contained these words: "Ten feet in width by twenty-six feet (or ten feet) on the north end to be used as an alley." In 1852, said master in chancery, in pursuance of the decree in the same cause, sold to one S. B. Fisher a parcel of land immediately west of the parcel so sold to William Carpenter, and having a frontage of 22 feet on Washington street, and a depth of 97 feet. In the same year the master in chancery, in pursuance of the same decree, sold to Fagan & Fitzpatrick a parcel of land immediately west of the land sold to Fisher, and having a frontage of 22 feet on Washington street, and a depth of 97 feet. All said deeds to Carpenter and Fisher and Fagan & Fitzpatrick were made at the same time, and by virtue of the same decree, in the same cause. Each of the deeds to Fisher and to Fagan & Fitzpatrick contained the words, "ten feet in width by twenty-two feet on the north end, to be used as an alley." The grantees in said deeds took immediate possession of the premises so sold to them, and they, or their grantees and descendants, by themselves or tenants, have remained in possession thereof for more than 20 years last past, and are now in possession of the same. There are no other words in said deeds restricting the rights of the grantees therein, except the words above quoted. The said

alley was closed at the west end thereof, and extended westward from its eastern opening only 80 feet, and did not run through the block in which it is located. Said alley has been open for the benefit of the parties for whom it was created, since said deeds were executed, and has been in continual use. The property in question is situated on the northeast corner of the public square in Springfield, and was when said deeds were made, and is now, business property, and business buildings were erected thereon soon after said deeds were executed. The appellee is a corporation organized under the laws of Illinois, and has a grant from the city of Springfield to erect poles and wires for the purpose of conducting electric currents for the purpose of furnishing electric lights on all the streets and alleys of said city. The tenant occupying the building on the lot 22 feet wide sold to Fisher, and lying next west of the lot on which the building of the appellants, 36 feet wide, stands, requested the appellee to introduce electric light into the building on said lot next west of the lot of appellants, through said alley, which was accordingly done. The wires were strung for this purpose along said alley, entering the alley at the east end thereof. The eastern ends of said wires are attached to a pole erected in Sixth street, which runs north and south on the east side of the building of appellants, and the wires extend west over said alley to the premises immediately west of the lot of appellants. The west ends of said wires, which are two in number, are attached to a cross arm fastened to a pole at the top thereof, which cross arm extends into the alley. Said wires are about 14 feet above the surface of the ground, and about three feet in the rear of the store building on the premises of the appellants. The pole to which the western ends of the wires are attached does not stand in said alley, but said cross arm and pole are wholly upon the premises to the west of the lot of the appellants. Said wires are now used by appellee to furnish electricity for lighting purposes to the tenants of the building adjoining the building of the appellants on the west. The wires were erected without the

knowledge or consent of appellants, or of either of them, before the commencement of this suit, and appellants requested appellee to remove said wires and cross arm from said alley, but appellee refused, and still refuses, to take down the two electric wires and cross arm from the alley. The present tenants of the Fisher lot are in the rightful possession of, and entitled to the enjoyment of, all easements and appurtenances created in favor of the Fisher lot.

C. A. Keys, for appellants.

Brown, Wheeler, Brown & Hay, for appellee.

MAGEUDEE, J. (after stating the facts): The alley in the rear of the building of appellants is a private alley, created for the use of the appellants and of the owners of the two lots lying west of the lot of the appellants. It is alleged in the bill that the easement consisting of the use of said alley, as created by the original deeds conveying the property, was so created for the benefit of the property of the appellants, and of the two pieces of property adjoining the property of the appellants on the west. It is admitted in the answer that the alley was reserved, as alleged in the bill, for the benefit of the properties aforesaid, and for a right of way to and from the rear of said premises. The words contained in the deeds, to wit, "Ten feet in width . . . on the north end, to be used as an alley," taken in connection with the allegations of the bill and the admissions of the answer as above set forth, clearly indicate that the alley is a private alley. The purpose of the reservation in the deeds was not for the use of the public, but for the use of the parties to the deeds; and hence the public acquired no right to the use of the alley, and no public easement was created therein. The fee of that portion of the alley, 10 feet wide and 36 feet long, in the rear of the building of the appellants, was in the appellants, as owners of the abutting property, subject, however, to the right of the property owners on the west to use the strip of land re-

served for the purposes of an alley. In other words, the title is in the appellants, but the property owners on the west have the right of passage over the alley, and the title of appellants is burdened only with said right of passage or easement. The question then presented is whether the appellee had the right to extend electric wires over the portion of the alley in the rear of the building of appellants, for the purpose of furnishing light to the occupants of the building lying west of the property of appellants, without the consent of the appellants.

It is conceded that the appellee company had a grant from the city to erect its poles and string its wires for the purpose of furnishing electric light along the streets and alleys of the city. But the alley here was not a public alley, over which the city had control, but was a private right of way, the use of which was confined to the appellants and the owners of the two properties adjoining them on the west. *Garrison v. Rudd*, 19 Ill. 558. It served as a means of accommodation to a limited neighborhood for local convenience. 2 Am. & Eng. Enc. Law (2nd Ed.), v. 149. It is also to be observed that here the electric wires passing over and above the alley were so placed for the purpose of furnishing light to private persons, and not for the purpose of furnishing light to the public. It seems to be clear that the use of this alley for the purpose thus indicated imposed a new and additional burden upon the fee owned by the appellants, subject to the easement consisting in the use of the alley. The erection and use of telegraph poles in a public highway, where the abutting landowner is the owner of the fee in the highway, constitutes a new servitude, which entitles such owner to recover damages for the additional use thus created. *Board v. Barnett*, 1 Am. Electl. Cas. 565, 107 Ill. 507. The principle which is applied to the erection of telegraph poles on a public highway, where the fee of the highway to the center thereof is in the abutting owner, and to the stringing of wires upon said poles over the highway, applies to a private alley, like that here under consideration, where the fee of the ground is in the owner of the prop-

erty abutting upon the alley. It is immaterial to inquire whether the damages are great or small. It is sufficient that the property rights of the appellants are interfered with in a manner detrimental to their interests, as the owners of the fee. The taking possession of their land forcibly and against their will comes within the constitutional inhibition that private property shall not be taken or damaged without just compensation. *Board v. Barnett, supra*. Nor is it material that the telegraph wires are some 14 feet above the surface of the ground. The owner of land, unless restricted by covenant or custom, has the complete control of the soil, together with the space above and below, so far as he may choose to use it. *Tanner v. Volentine*, 75 Ill. 624. The uncontradicted evidence tends to show that the presence of the wires in the alley would operate as a hindrance to the fire department in case it should become necessary to extinguish a fire in the building of the appellants, and also that the presence of the wires in the alley would have a tendency to obstruct the conveyance of freight or other material to and from the second story or upper window in the rear part of the building of appellants.

It is laid down in some of the authorities that the erection of electric light poles by city authorities for the purpose of lighting the public ways and places is not a taking of private property for public use, upon the ground that the use of the streets for this purpose is in the nature of an exercise of the police power by the city. But when an electric light company erects poles or strings wires, not for the purpose of lighting public ways and places, but for the purpose of supplying light to private individuals and firms in the transaction of its own corporate and commercial business, such erection of poles and stringing of wires constitute an additional easement in the highway or private alley, for which the owner of the fee may demand compensation. *Light Co. v. Hart*, 4 Am. Electl. Cas. 148, 13 Pa. Co. Ct. 369; *Tiffany v. Illuminating Co.*, 1 Am. Electl. Cas. 629, 51 N. Y. Super. Ct. 280; *Crow. Electricity*, sec. 126. It has

been held that the laying down of gas pipes or other pipes for the purpose of supplying the city and its inhabitants with light is a legitimate use of the streets, for which the abutting owner is not entitled to compensation. 2 Dill. Mun. Corp. (4th Ed.), sec. 691, note; Elliott, Roads & S. p. 305; *Chicago, B. & Q. R. Co. v. West Chicago St. R. Co.*, 156 Ill. 255, 40 N. E. 1008. And it has been said that the legal relations of electric light wires through the streets of a city must be analogous to those of gas pipes, upon the ground that both the electric light wires and the gas pipes are means of furnishing light from a central source of supply, and that, if the laying of gas pipes in a city street is not an additional servitude on the land of the abutting owner, the same should be true of laying tubes for electric light wires, or placing posts in the ground for carrying the wires overhead. Keasbey, *Electric Wires*, p. 86. This doctrine, however, applies only to such public streets and alleys as are under the control of the municipality, and where the light to be transmitted by the wires or pipes is for the benefit of the public, as well as of property owners along the line of the street. The doctrine, however, can have no application to such a private alley as is that in the case at bar, where the fee of the ground in the alley is in the abutting owners, and where the easement, consisting of the use of the alley, is confined to a limited number of property owners, whose lands abut upon the alley. When the strip of land in question was reserved in the original deeds for the purpose of an alley, it was intended for the ordinary purposes of passage and repassage, and not for the erection of any such permanent obstruction as the stringing of wires in the manner shown in the present record.

It is said by the appellee that equity has no jurisdiction to entertain the present bill. We regard this contention as without force. Where a party has a right of way over, or an easement in, certain real estate, and the same is obstructed, equity has jurisdiction, as the injured party has no adequate remedy at law. *McCann v. Day*, 57 Ill. 101. Moreover, the injury com-

plained of is one of a continuing or permanent nature, for which an action at law would not afford a complete and adequate remedy. *Sterling's Appeal*, 111 Pa. St. 35, 2 Atl. 105. The decree of the Circuit Court is reversed, and the cause is remanded to that court for further proceedings in accordance with the views herein expressed. Reversed and remanded.

NOTE.—See note 2 at end of Part II.

WENDELL ANDREAS V. GAS & ELECTRIC COMPANY OF BERGEN
COUNTY.

New Jersey Court of Chancery, November 17, 1900.

ELECTRIC LIGHT LINE FOR PRIVATE LIGHTING NEW BURDEN.

The act of April 21, 1896 (P. L. p. 322), authorizing the use of public highways for distribution of electricity, forbids the erection of poles to conduct electricity for private lighting without the consent of abutting owners. Such erection is a taking of such owner's land, for which he is entitled to compensation.

The act of March 24, 1899 (P. L. p. 399, sec. 67), authorizing contracts with private corporations for public lighting of streets, restricts the authority to such lighting and does not permit the licensee to do private lighting without compensating the abutting owner for the use of his land.

Cases of this series cited in opinion: *Halsey v. Rapid Trans. St. Ry. Co.*, vol. 3, p. 283; *State, Meyers, Pros., v. Hudson Co. Elec. Co.*, vol. 7, p. 49; *State, Roebeling, Pros., v. Trenton Pass. Ry. Co.*, vol. 6, p. 137.

Application for injunction.

Charles L. Corbin, for complainant.

Milton Demarest, for defendant.

PITNEY, V. C.: The object of the bill is to obtain an injunction from this court to prevent the defendant from erecting poles

to support electric wires in front of the complainant's land. The complainant is the owner of a tract of land in the township of Teaneck, in the county of Bergen, which is bisected by a road known as the "River Road." The defendant is a corporation whose business is "the furnishing of light and power by electricity throughout a great part of the county of Bergen to private consumers, and also for public lighting," and is actually engaged in the business of lighting the streets of the township of Teaneck. On the 21st of September, 1900, the defendant entered into a written contract with the municipal authorities of Teaneck by which the defendant agreed to furnish "sixty or more street lights, with all the appurtenances, posts, wires, etc., necessary for the maintenance and operation of the same, and to light the said lights with their full power every night, according to the standard all-night lighting schedule," for the term of five years from October 1, 1900; and the township agreed to pay certain annual compensation therefor. The contract does not locate any of the lights to be so furnished, nor provide, other than as may be implied from what is above stated, for the erection of any poles in any particular street or streets. By a subsequent arrangement the term of the contract was reduced from five years to one year. This was done for the purpose of preventing its being rendered void by reason of a lack of preliminary formalities requisite to authorize a contract for a term of years. In pursuance of that contract the defendant proposes to erect several poles on Pine street, in front of the complainant's premises. The street where it crosses complainant's premises is rather narrow, and he proposes to widen it, and, with that view, pointed out to the defendant's workmen where his new street line would be, and the positions where its poles must be placed. The defendant construed this pointing out by the complainant as a permission by him to place its poles, and proceeded to dig holes in the complainant's fields. No fault is found by the complainant with the location of the holes, nor was any proof offered as to just where in the line of the street, when widened as proposed,

the poles will stand; but it is to be inferred that they will be placed where such poles are usually placed, namely, in the edge of the sidewalk, and not in any part of the traveled wagon road or gutter. The defendant brought on the ground the poles which it proposes to erect, and when the complainant saw these he forbade their erection, and applied to this court for an injunction, obtained a restraining order, and the poles have not been erected. The complainant swears and contends that he has not assented to the erection of any poles, and that the defendant has no right to erect poles in the excavations made for them, without either his consent or condemnation by proper proceedings of the right to erect them.

It was supposed at the argument that the act of May 22, 1894 (P. L. p. 477; 2 Gen. St. p. 2174, sec. 242), justified the erection of poles for certain purposes without the consent of the owner. But this act was subsequently found to have been repealed by the act of 1899 (P. L. p. 426), so that there is now in existence no statute which directly authorizes the erection of such poles without the consent of the landowner. The only other act now in force which deals directly with the subject is the act of April 21, 1896 (P. L. p. 322), and that requires the consent in writing of the owners of the soil. The defendant relies for its right to act without such consent on the township revision act of March 24, 1899 (P. L. p. 399, secs. 67, 68). Section 67 reads as follows: "The township committee shall have the power to provide for lighting the streets and public places of the township, and for that purpose may contract with any person or private corporation for a supply of light for public use in said township." Section 68 provides that no contract shall be made for more than one year, without certain preliminary formalities.

Counsel contends that the sixty-seventh section gives power to the township authorities to make such a contract as was made in this case, and that by implication it is authorized to use the public highways for that purpose without making compensation

to the owner of the soil, and relies upon the case of *Halsey v. Railway Co.*, 3 Am. Electl. Cas. 283 (decided by Vice Chancellor VAN FLEET), 47 N. J. Eq. 389, 20 Atl. 859. There the question was whether poles erected in the center of the street, and just on the line of complainant's land, for the purpose of stringing wires for the conduct of an electrical current which should serve for two purposes: First, in propelling street cars; and, second, for lighting the streets—was an additional burden upon the owner of the fee, over and above that of a public highway, for which he was entitled to have compensation. At page 393, 47 N. J. Eq., and page 863, 20 Atl., the vice chancellor says: "The decision in these cases was placed upon this manifestly just principle: That the question whether a new method of using a street for public travel results in the imposition of an additional burden on the land or not must be determined by the use which the new method makes of the street, and not by the motive power which it employs in such use. The use is the test, and not the motive power. And this principle exhibits in a very clear light the reason why it has been held that the placing of telegraph and telephone poles in the street imposes an additional servitude on the land. They are not placed in the street to aid the public in exercising their right of free passage, nor to facilitate the use of the street as a public way, but to aid in the transmission of intelligence. Although our public highways have always been used for carrying the mails and for the promotion of other like means of communication, yet the use of them for a like purpose by means of the telegraph and telephone differs so essentially in every material respect from their general and ordinary uses that the general current of judicial authority has declared that it was not within the public easement. Massachusetts has, however, by a divided court, held otherwise." And again, on page 395, 47 N. J. Eq., and page 864, 20 Atl., he says: "There can, however, be no doubt, I think, that erections may be lawfully made in the streets of a city for the purpose of lighting them. They must be lighted at night, to make their

use safe and convenient, and to prevent lawlessness and crime. By the charter of Newark power is given to its governing body, by express words, to light the streets, parks, and other public places. I have no doubt that in virtue of this power the city has the right to erect poles in the street just where the poles in question are. The poles in question are in fact to be used for the purpose of lighting the street. One of the conditions on which the city gave its consent to the erection of the poles is that the defendant shall place on every other pole a group of five incandescent lights, of sixteen candle power each, and furnish such light every night. This use of the poles and wires would, in my judgment, legalize their erection, but this is not their primary use. They were erected primarily and principally to facilitate the use of the street and add to its convenience as a public way, and it is upon this ground that I think it should be declared that their presence in the street invades no right of the complainant." But the learned vice chancellor in the previous part of his opinion clearly distinguishes between an erection of any kind placed in the part of the street devoted to the use of vehicles and that devoted for the use of a sidewalk. On page 387, 47 N. J. Eq., and page 861, 20 Atl., he says: "The poles have been placed on that part of the complainant's land where, if their erection constitutes a legal injury at all, they will do the least possible harm. They have been placed on the edge of his boundary line, at a point where, so long as his land remains subject to the public easement, it is not possible for him to make any use whatever of the land. Had they been placed on the sidewalk in front of his premises, rights growing out of a duty incumbent upon the abutting owner in respect to that part of the street might have made it the duty of the court to consider questions not at all involved in this case." And then, after citing authorities showing the peculiar rights of the landowner in the sidewalk, he says, on page 388, 47 N. J. Eq., and page 862, 20 Atl.: "These utterances show that there is a material distinction between the rights of an abutting owner in the sidewalk adjacent to his

premises and those which he may exercise over the other part of the street. I entertain no doubt that that part of the street which has been set apart for public use by means of vehicles may be lawfully applied to uses which would be unlawful, as against the adjacent owner, if exercised, against his will, on the sidewalk which his money has paid for."

The counsel of defendant further relies upon the case of *Meyers v. Electric Co.* (decided by the Court of Errors and Appeals Nov. 27, 1899), 7 Am. Electl. Cas. 49, 44 Atl. 713. There the court dealt with the act of May 22, 1894, which, as we have seen, has been repealed, and which expressly authorized the erection and maintenance of all necessary and proper posts, poles, lanterns, and fixtures on any or all of the public roads, streets, lanes, or alleys; and it was held that the ordinance there drawn in question was not invalid because it authorized the erection of poles upon the lands of the prosecutor, presumably in the margin of the sidewalk. That case was based on the case of *Roebling v. Railway Co.*, 6 Am. Electl. Cas. 137, 58 N. J. Law, 666, 34 Atl. 1090, 33 L. R. A. 129, which, as well as *Meyers v. Electric Co.*, was a certiorari to test the validity of an ordinance which authorized the setting of poles to sustain wires to be used for conducting electricity to propel a street railway. The distinction between the sidewalk and the traveled way taken by Vice Chancellor VAN FLEET in *Halsey v. Railway Co.* was not dealt with in either case. In the *Roebling Case* the ordinance under review provided specially for the setting of certain poles in the edge of the sidewalk on complainant's property, and the contention of the prosecutrix was that it would result in putting an additional burden on her land. Mr. Justice DEPUE, in speaking for the Court of Errors and Appeals, says that the fact that the carrying out of the ordinance may work an actionable injury to the prosecutrix's land was not a reason for setting it aside, but that the prosecutrix should be left to her action at law. At page 675, 58 N. J. Law, and page 1093, 34 Atl. he says: "If any of the privileges granted by this statute are made the occa-

sion for unlawfully injuring the owners of abutting property, such acts of the company are *ultra vires*, and redressible by action at the suit of the injured party. The act of the legislature is a general law for the equipment of street railways throughout the State, and the ordinance under review is, in those respects which are material to this controversy, similar to the ordinances under which many street railways have been equipped and are operated. A decision that such ordinances and the statute under which they were made were invalid, for the reason that, in a particular case before the court, it should appear that these privileges have been made the occasion for unlawfully injuring private property, when such injury was not the direct product of the ordinance, would be disastrous to public interests and not warranted in law. For such injuries the remedy of the party injured is by action. If the acts done under color of the ordinance or the statute be found to be an unlawful invasion of the rights of private property, an action will lie, in which neither the ordinance nor the statute would be a justification."

But I do not find it necessary to determine the question—if there be any question—of the right of the municipality, under the sixty-seventh section of the township act, to erect poles for public lighting purposes on the sidewalk in front of complainant's land without his consent, for the reason that the complainant's counsel at the hearing, and in his written argument, expressly assents to the erection of such poles for the purpose of lighting the streets of the township of Teaneck, but not for the purpose of private lighting or the transmission of power, or of carrying electricity over wires to adjacent districts outside of that township. This assent is made upon the express condition that the poles to be erected shall be no larger and have no more arms than are reasonably necessary for the purpose of public lighting of the township of Teaneck. The complainant contends that it is manifest from the size and character of the poles and arms to be attached thereto, brought upon the ground, that the object is something more than the mere lighting of the streets.

of Teaneck; that the object is to furnish power and light to individual consumers both in that township and in the adjacent neighborhood, and also to put upon the poles wires to extend through to other townships and territory outside of Teaneck; and that so doing will put an additional burden on his land, for which either his consent must be obtained or compensation made. The proofs show that the poles to be erected are 40 feet high, and about 18 inches in diameter at the butt; that they are notched for four cross arms, and that the cross arms brought on the ground are marked for six wires, making in all 24 wires to be strung in front of complainant's land. It was hardly affirmed in the affidavits or contended in the argument that poles of that size, with so many arms upon them, are necessary for simply the purpose of public street lighting in the township of Teaneck. In fact, the affidavits show that they are much larger than those previously used by defendant in Teaneck. The purpose of the defendant's incorporation, as stated in the bill and admitted in the answer, is the "supplying of light and power by electricity through the greater part of the county of Bergen to private consumers, and also for public lighting." And common knowledge leads to the inference that, in order to reach one township, it may be necessary for it to cross another township. Now here comes in the distinction taken by the Court of Errors and Appeals, in the case just cited (*Meyers v. Electric Co.*), between public lighting and private lighting. The act of 1896 was held to apply only to private lighting—that is, lighting the houses of private individuals; and that act expressly provided for the consent of the landowner. And there is, I think, a clear distinction between the function of providing light for strictly public purposes and private purposes, precisely as there is a distinction between providing water for municipal purposes—extinguishment of fires and sprinkling of streets—and providing it for private consumers. The municipality may be under an actual or implied obligation to supply water for the extinction of fires, and light for the lighting of streets, while it is under no such obliga-

tion to furnish either of those elements for private use. And this position is not inconsistent with the general proposition that the furnishing of water and light for private use is a public purpose. This is perfectly well settled. But it is also perfectly well settled that private property cannot be taken for such a public use without compensation first made; and I can find nothing in the reported decisions or judicial utterances in this State which warrants the idea that, because a municipality may undertake to supply either water or gas or electricity for lighting purposes to private consumers, it is thereby relieved of the constitutional duty of making compensation to persons whose property shall be taken for that purpose. At any rate, there is, so far as I know, no legislation in New Jersey authorizing such action with regard to lighting by electricity. As the law stands at this time, any corporation desiring to use private property for the purpose of furnishing light by electricity for private consumption must make just compensation wherever it takes, in the sense in which that word is used in that connection, private property for that purpose. The question, then, is whether the placing on the public sidewalk, the fee of which, with the adjoining property, is owned by the complainant, poles for that purpose, will be a taking of his land. I am of the opinion that it will be, in the sense that it will impose upon it a greater burden than can justly be implied from the laying out of a highway across same, or the dedication of a part of his land for the purposes of a highway. As pointed out by Vice Chancellor VAN FLEET in the *Halsey Case*, the lighting of streets may be considered as necessary in order to make them safe for use at night. But this consideration does not reach the lighting of the interior of the houses built along their route. It is a matter of common knowledge that the larger the pole, and the more numerous its arms and wires, the greater the nuisance to the premises before which it is erected. So that it is impossible to say that it is no greater injury to the owner of the land to erect thereon poles with arms for the purpose of conducting a current of electricity sufficient to be used for the purpose of power and for private lighting in a large district, than the erection of poles for a more restricted purpose.

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The result is that I find that the legislature has not only not given authority to a municipality or its licensee to erect poles on the sidewalk to support wires to conduct electricity for use in private lighting or for the transmission of power, but has, by the act of 1896 above referred to, by implication forbidden such erection without the consent of the landowner; and my impression is that such authority, if given, would probably be held to be unconstitutional, unless given upon terms of making compensation, and that the authority given by implication by the sixty-seventh section of the township act of 1899 must be confined to the purpose of lighting the streets within the limits of the municipality. The affidavits tend to show sufficiently for present purposes that the poles, with arms and wires proposed to be erected upon complainant's land, are larger than is necessary for the purpose for which the legislature has authorized their erection, and will be a greater nuisance to complainant than that purpose requires. I will therefore advise an injunction against their erection. The parties will be given a proper opportunity in the course of the suit to obtain a judicial determination upon the question as to what size of poles, and what number of arms thereon, and wires to be strung thereon, are necessary for the lighting of the streets of Teaneck.

NOTE.—See note 2 at end of Part II.

MINNIE L. JAYNES V. OMAHA STREET RAILWAY COMPANY.

Nebraska Supreme Court, February 2, 1898.

(53 Neb. 682.)

ELECTRIC STREET RAILWAY.—ADDITIONAL SERVITUDE.—DEPRECIATION OF REAL ESTATE.

The poles and wires of an electric railway company constitute an additional burden upon the street in which they are placed, and the abutting lot-owners are entitled to whatever damages their property has sustained by reason thereof.

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But if not, still an abutting owner may be entitled to damages if the poles and wires of the railway interfere with ingress and egress to his property, and thus diminish its value.

Cases of this series cited in opinion: *Louisville Bagging Mfg. Co. v. Cent. Pass. Ry. Co.*, vol. 4, p. 202; *Williams v. City Elec. Ry. Co.*, vol. 3, p. 231; *Ogden City Railway Co. v. Ogden City*, vol. 3, p. 321; *Taggart v. Newport St. Ry. Co.*, vol. 3, p. 306; *Halsey v. Rapid Trans. St. Ry. Co.*, vol. 3, p. 283; *Lookhart v. Craig St. Ry. Co.*, vol. 3, p. 314; *Detroit City Ry. Co. v. Mills*, vol. 3, p. 333; *Koch v. No. Av. Ry. Co.*, vol. 4, p. 153; *Limburger v. San Antonio, etc., Ry. Co.*, vol. 5, p. 156; *Board of Trade Tel. Co. v. Barnett*, vol. 1, p. 565; *Ches. & Pot. Teleph. Co. v. Mackenzie*, vol. 3, p. 196; *W. U. Tel. Co. v. Williams*, vol. 3, p. 184; *Eels v. Am. Teleph. & Tel. Co.*, vol. 5, p. 92; *Pa. Ry. Co. v. Mont. Co. Pass. Ry. Co.*, vol. 5, p. 166; *Elliott v. Newport St. R. Co.*, vol. 4, p. 449.

Appeal by plaintiff below from judgment of District Court, Douglas county.

Brome, Andrews & Sheean and *H. C. Brome*, for plaintiff in error.

John L. Webster, for defendant in error.

RAGAN, C.: Minnie L. Jaynes brought this suit to the District Court of Douglas county against the Omaha Street Railway Company, hereafter called the "Railway Company," a corporation organized under the laws of the State, and owning and operating an electric street railway in the streets of the city of Omaha, by permission of the city's authority. Jaynes in her petition alleged, among other things, that she was the owner of lot 8, in block 15, in R. V. Smith's addition to the city of Omaha; that said lot was a tract of land 243 feet in length east and west, and 66 feet in width north and south; that it was bounded on the east by Sixteenth street; and on the south by Clark street; that the railway company had constructed its railway over and upon and along the surface of said Sixteenth and Clark streets, in front of her property, and was operating its cars thereon, the motive power being electricity; that the railway company, for the purpose of so operating its cars, had

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erected poles on either side of said streets adjacent to her premises, and placed a wire upon said poles parallel to the railway track, and had strung wires across said streets on said poles; that, by reason of such construction and operation of said railway on said tracks adjacent to said premises, the value of the latter had been greatly depreciated; that the location of the poles and wires of the railway company in said streets interfered with Jaynes' ingress to and egress from her property, and thereby depreciated its value. There was a prayer for a judgment for damages. To this petition the railway company filed a general demurrer, based on its contention that the petition did not state facts sufficient to constitute a cause of action. The District Court sustained the demurrer, and dismissed the petition, and Jaynes brings that judgment here for review on error.

1. By sections 104-106, art. 1, c. 14, Comp. St. 1897, it is made the duty of every original owner or proprietor of any tract of land, who shall subdivide the same for the purpose of laying it out in an addition to a city, to cause a plat of such subdivision to be made, with reference to known or permanent monuments, and in such plat give the dimensions and courses of all streets and alleys established thereby, and to execute and acknowledge this plat before some officer authorized to take acknowledgments of deeds, and, when so executed, to file such plat for record in the office of the register of deeds of the proper county. The acknowledgment and record of such an instrument is equivalent to a deed in fee simple of such portion of the premises platted as is on such plat set apart for streets and other public purposes. Assuming that Smith was the original owner of the lands out of which the lots of Jaynes were carved, and that he complied with the statute just quoted, and thereby dedicated these streets to the public, and thereby conveyed the fee-simple title of these streets to the city of Omaha, we have the question: For what purpose was this dedication or grant made? The particular purposes which were in the mind of the owner at the time he made this dedication or grant are not expressed therein; and the question

therefore is, for what purpose does the law imply or presume the owner granted these streets to the public? Is the construction and operation of such an electric railway as the one here, on the surface of these streets, embraced in the purposes for which the original owner dedicated these streets to the public? Or, in the language of the lawbooks, is the construction and operation of this street railway an additional burden or servitude on the easement granted?

It is said by Booth, in section 83 of his work on Street Railways, that the courts of last resort of the country, to which the question has been presented, have all decided that the construction and operation of such a street railway as the one in question here was not an additional servitude to those embraced in the original grant. The courts referred to by this author are Kentucky, Michigan, Maryland, New Jersey, Pennsylvania, Rhode Island, Utah, and the United States Circuit Court for the District of Arkansas. We shall briefly examine these cases.

The Kentucky case was decided in 1893, and is the *Louisville Bagging Mfg. Co. v. Central Pass. Ry. Co.*, 4 Am. Electl. Cas. 202, 95 Ky. 50, 23 S. W. 592. It was an application for an injunction by the owner of a lot fronting on a street to enjoin the construction and maintenance of an electric street railway on two grounds: (1) That it would interfere with the lot owner's accustomed use of the street for backing vehicles up to his warehouse; (2) would be dangerous to those residing or doing business on the street. The *nisi prius* court denied the application for injunction, and its judgment was affirmed by the Court of Appeals; but the question as to whether the construction and operation of the street railway was an additional burden is not mentioned in the case, nor is the question as to whether the street railway company would be liable to damages for the injury done to the lot owner's property by the construction and operation of the railway either argued or discussed in the opinion; and though the question as to whether electric street railways were additional burdens had prior to that date been presented to

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several courts of last resort, no case of any court is cited in the opinion.

The case from the United States Circuit Court for the District of Arkansas is *Williams v. Railway Co.*, 3 Am. Electl. Cas. 231, 41 Fed. 556. In that case the United States Circuit Court held that the construction and operation of a street railway on the streets of a city was not an additional burden simply because of the fact that the cars were moved by steam. That was the only point in the case. No such question as the one here was involved in the Arkansas case.

The Utah case referred to is *Ogden City Ry. Co. v. Ogden City*, 3 Am. Electl. Cas. 321, 26 Pac. 288. This case was decided in 1891, and was an application for an injunction by the Ogden City Railway Company against Ogden city and another railway company, to enjoin Ogden city from carrying into effect an ordinance granting to this other railway company permission to lay a double-tracked street railway in a certain street of Ogden city—the contention of the Ogden City Street Railway Company being that in 1883 Ogden city by ordinance had granted it permission to lay down a double-tracked street railway in said streets; that it had already constructed a single track, with turn-outs, in that street; and that, if the other railway company was granted permission to construct another double track railway in the same street, the streets would be so obstructed by the four tracks as to interfere with other modes of travel; and that if the defendant street railway company, in constructing its track, should use poles and wires, the plaintiff street railway's property would be greatly damaged thereby. The injunction was denied. The court said: "The allegations of fact are not sufficient to warrant an injunction on the ground that the construction of the defendant's railway would damage the abutting property by materially interfering with rights appurtenant thereto." We do not think this is an adjudication that the construction and operation of an electric street railway in the streets of a city is not an additional burden; and, though that question had prior to

that time been before the courts of Rhode Island and New Jersey, the opinions in those cases are not referred to, nor is there an opinion of any other court mentioned.

The earliest case that we have been able to find in which the question under consideration was decided is *Taggart v. Railway Co.* (R. I.), 3 Am. Electl. Cas. 306, 19 Ala. 326, decided in January, 1890. This was an application for an injunction by abutting property owners to enjoin the street railway company from erecting poles and wires, as concomitants of their street railway, in front of the complainant's property. It appears that prior to the time the suit was brought the street railway company had been using horses to move its cars, and were about to substitute electricity as a motive power. In the opinion the court enumerates the grounds upon which the injunction was asked as (1) that the street railway company had not given certain notices required by the law of its incorporation; (2) that the use of electricity was illegal, as the statute creating the street railway company authorized it to use as a motive power, "steam, horse or other power as the city council of said city and towns may from time to time direct;" (3) that the erection of the poles was prohibited by the act incorporating the street railway company, as that act provided that the street railway should be used, constructed and operated so that "such corporation shall not incur any portion of the streets occupied by such tracks." The court held that the company had given the notice required by statute; that the use of electricity as a motive power was expressed within the law creating the corporation; and that the poles in the street were not an incumbrance, within the meaning of the act creating the corporation, taking Webster's definition of the word "incumber." The court denied the injunction; and said in the fifth point of the syllabus: "The change of the power by which a street railway is operated from horse power to electricity, and the erection of poles necessary for its operation, does not impose an additional burden on the abutting property owners." The court reached this conclusion: That the

street railway, with its poles and wires, was not an additional burden, by finding that the electric street railway company did not occupy the streets any more exclusively than it would if operated by horse power. There is no question that the law of the case was correctly laid down if the evidence, or the record on its face, sustains the findings of fact made by the court that the electric street railway no more exclusively occupies the street than an ordinary horse railway.

The Rhode Island case just noticed was quoted as an authority for the proposition that an electric street railway is not an additional burden by the Supreme Court of New Jersey in December, 1890, in *Halsey v. Railway Co.*, 3 Am. Electl. Cas. 283, 20 Atl. 859. In this case an abutting lot owner sought to enjoin a street railway company from building its track in a street opposite his premises, and from erecting certain iron poles in the center of the street, to be used in the operation of its cars. The court denied the injunction, and held that the placing of the poles in the middle of the street, for the purpose of using electricity for street car propulsion, did not impose a new servitude on the land in the street. But it would seem, from a reading of the opinion, that the complainant's application for an injunction was denied on the ground of the court's doubt as to whether the complainant's property had been or would be damaged by the erection of these poles in the center of the street opposite his property. The court said: "It is true there is a very small space in the middle of the street over which a wagon approaching the entrance cannot pass, but it may pass on either side. Besides, the distance of the pole from the entrance renders it very improbable, as it seems to me, that a wagon, in passing from the street to the entrance, would, if there was no pole there, pass over this space one time in fifty. Certain it is that, even if it be true that the pole diminishes the complainant's means of access to the entrance, the diminution is so insignificant as to lay no ground for relief in equity. A doubt as to whether the complainant's land in the street has been appropriated to a purpose for which the public has no right to

use it will, at this stage of the cause, be fatal to his claim to an injunction. . . . It is impossible to emphasize too strongly the rule so often enforced in this court, that a preliminary injunction will not be allowed where either the complainant's right which he seeks to have protected *in limine* by an interlocutory injunction is in doubt, or where the injury which may result from the invasion of that right is not irreparable."

The Supreme Court of Pennsylvania, in January, 1891, in *Lockhart v. Railway Co.*, 3 Am. Electl. Cas. 314, 21 Atl. 26, referred to the Rhode Island case as being directly in point, and, if good law, controlling the case under consideration. The Pennsylvania case was an application for an injunction by abutting property owners to restrain the street railway company from constructing and operating its road in a street in front of the complainant's property. The court denied the injunction, and stated the question to be whether the construction of the street railway, with its poles and wires, amounted to a taking of the property of the complainants without compensation. The court said: "The placing of the wires over the streets does not appear to be a taking of plaintiff's property. The streets are dedicated to public use, and he has certain special rights, as an abutting owner, but I cannot see how a wire run through the air above the streets can be said to be a taking, injury, or destroying his property. But another question arises in reference to the posts placed in the ground for the support of the wires by means of which the cars are moved. . . . And it may be now taken as settled that the owner's rights of abutting property are subject to the paramount right of the public, and the rights of the public are not limited to a mere right of way, but extend to all beneficial, legitimate street uses, as the public may from time to time require. . . . The case of *Taggart v. Railway Co.* (R. I.), 3 Am. Electl. Cas. 306, 19 Atl. 326, is directly in point, and, if good law, covers the case in hand. My own impression is that the use of poles, wires, and other necessary appliances, such as proposed, being used by defendants, is not, in any respect, a greater interference with the

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ownership of the adjoining property owner on a street than the use of streets for fire plugs, horse troughs," etc. "To my mind, the power in the Craig Street Railway Company to construct and maintain a railroad, in compliance with the terms of the act under which it was incorporated, is clear, and that these defendants have shown a legal right to proceed and construct the railway contemplated by them, unless the failure to provide means by which the plaintiffs may have such damages as they may sustain assessed and paid or secured in advance renders the act unconstitutional. Upon this question I am not free from doubt, but the decided inclination of my mind is that the act is not unconstitutional for that reason, because the use of the streets for the purpose of applying motive power in the manner proposed is not such a new use as in cities should be treated as outside the proper use for which streets will be held to have been originally dedicated to the public use. *Taggart v. Railway Co.*, before cited, is exactly in point. The case presented by plaintiffs is certainly not so clear from doubt that a chancellor should grant an injunction summarily stopping a great public improvement before final hearing, more particularly if the position taken by plaintiffs is correct, and defendants have no legal right to take possession of the streets, as they are about to do. A common-law action will compel them to pay all damages arising to plaintiffs, and thereafter equity would probably afford a complete remedy, by which the wrong done them could be fully corrected." It seems from this that the Supreme Court of Pennsylvania did not decide, at least in this case, that an abutting property owner was remediless if the construction of the street railway in front of his property damaged it, but denied the abutting property owner an injunction to restrain the erection of the improvement, leaving the question as to whether he was damaged, and, if so, how much, to the law courts.

In *Railway Co. v. Mills* (Mich., decided May, 1891), 3 Am. Electl. Cas. 333, 48 N. W. 1007, the street railway company was erecting its poles and constructing its tracks in a street in front

of a lot owner's property. The lot owner cut the poles down, and threatened to continue to do so as long as they were erected, and thereupon the railway company enjoined the lot owner from interfering with its construction of the railway. The *nisi prius* court made the injunction perpetual. The property owner appealed, and the Supreme Court affirmed the judgment. The question as to whether the proposed erection of the poles and wires and tracks on the street constituted an additional burden upon the easement seems to have been much discussed in the case. In the syllabus the court said: "The use of the street for street railways, in such a way as not to interfere with the right of a lot owner, as one of the public, to pass and repass thereon, or with the right of ingress or egress to and from his lot, does not impose a new burden and servitude, additional to what was implied by the dedication, which it is beyond the power of the city to authorize without additional compensation to the abutting lot owners." The court was composed of five judges. Two of these judges seem to have been of opinion that the street railway involved in the action, as it was proposed to be constructed, was not or would not be an additional burden upon the easement. Two of the judges dissented from that opinion, and the third concurred in affirming the judgment of the lower court, but said: "I am not prepared to say that the construction of a street railroad track in a street is of itself no additional burden or servitude upon the street. I think it is, but to what extent depends upon all the facts and circumstances under which it is imposed."

The cases heretofore alluded to from Kentucky, New Jersey, and Pennsylvania are referred to in the majority opinion as authorities for the proposition that an electric street railway track, with its wires and poles, is not an additional burden. But the most that can be said for the Michigan case is that whether such a street railway is or is not an additional burden is a question of fact, depending upon whether or not it is so operated and constructed as to interfere with the lot owner's right of ingress

and egress to and from his property and his free use of the street.

The Maryland case referred to by Booth is *Koch v. Railway Co.* (decided Jan., 1892), 4 Am. Electl. Cas. 153, 23 Atl. 463. It was an application by abutting lot owners to enjoin a street railway company from constructing its road in a certain street in front of their property. The application was based upon four grounds: (1) That the defendant was not lawfully incorporated; (2) that it had no right to lay tracks of its own outside of tracks already laid in the street by street railway companies; (3) that the city of Baltimore had no authority to authorize the railway to use electricity as a motive power; (4) that the road proposed to be built was an elevated road, within the meaning of the statute, which provided that no elevated road should be built in that street. The court overruled each of those contentions, and denied the injunction. The cases already alluded to from Rhode Island, New Jersey, Pennsylvania, and the Federal district of Arkansas are referred to in the opinion, and it is said of them that "they proceed on the principle that a street is a way set apart for public travel, and that the use of electricity for propelling street cars is but a new and improved motive power, in no manner inconsistent with the uses and purposes for which streets were opened and dedicated as ways for public travel." And the court decides that the use of electricity as a motive power for street cars does not impose a new servitude upon the streets, so as to entitle the abutting owner to compensation. But the question as to whether poles and wires placed in a street in front of an abutting owner's premises constituted an additional servitude, entitling him to compensation, was neither presented to nor decided by the court.

In *Limburger v. Railway Co.*, 5 Am. Electl. Cas. 156, 30 S. W. 533, the Supreme Court of Texas held that "the use of a street for an electric railway does not impose an additional burden or servitude to that implied by the dedication." That was an action by an abutting property owner against a street railway

company to recover damages which he alleged his property had sustained by the construction of a street railway track between the curb of the street and another railway track in the street. The cases hereinbefore referred to were cited by the Supreme Court of Texas as authorities for the conclusion reached by it. But it is to be noticed that in the Texas case there is not one word on the subject of poles and wires. It does not appear whether or not this street railway used any poles and wires for the operation of its road. So far as the opinion discloses, the whole complaint of the abutting property owner was the presence in the street in front of his property of the tracks and the cars thereon. These are all the cases which I have been able to find which hold (if they do) that an electric street railway, with its concomitants of poles and wires, is not an additional burden, and, if the abutting owner's property is damaged by the use of the streets for such poles and wires, that he has no remedy for such damages.

The leading case is the Rhode Island case, and the conclusion reached there was predicated upon the court's finding that the electric street railway did not occupy any more exclusively any portion of the street than an ordinary horse railway would. If all the other cases follow the Rhode Island case, and if it can be said that these cases are authority for the proposition contended for here, that an electric street railway, with its wires and poles, is not an additional burden, then it is worth while to observe that the principle upon which the cases rest is the one mentioned by the Rhode Island court, namely, not an exclusive and continued occupation of a part of a street to the exclusion of the rest of the public. That principle is sound. But in the case at bar there is no room for the conclusion that the street railway company, by the poles and wires which it has placed in the street, does not exclusively occupy a portion of that street to the exclusion of the rest of the public.

Looking at the original platting of Jaynes' property, and the dedication made by the then owner of the lots of a part of it for a street, we think the true construction of the grant made is this:

That the grantor intended that the street should be used for the purpose of enabling the public to pass and repass thereon; that it might pass on foot, on horseback, or in vehicles, and that whether the motive power of the vehicles should be steam, electricity, horse power, compressed air, or any other power. The grant contemplated the right of the public to temporarily use any part and all of these streets for the purpose of passing over them in any manner that it might choose, and by such means as it might see fit to employ. But the grant did not contemplate that any person or corporation might exclusively and permanently appropriate any part of these streets to its use, to the continued exclusion of the rest of the public.

In the case at bar the railway company, with its poles and wires, has exclusively appropriated a portion of these streets to its own use, to the exclusion of the rest of the public. If the railway company were moving its cars on the surface of these streets by electric power, without so permanently and exclusively occupying any portion of the street, we do not think the mere fact that the motive power used was electricity would take the use out of the purpose contemplated by the original grant. The use made of these streets by the railway company is not one in common with that of the public generally. Its poles and wires remain, and must remain, and exclusively occupy, particular portions of the street, and continuously exclude the public from such portions. Whether a use made of a street is an additional burden upon the easement we do not think depends upon the motive power which moves the vehicle employed. It depends upon the question whether the vehicle and appliances used in and necessary to effectuate that purpose permanently and exclusively occupy all or a portion of the street, to the continued exclusion of the rest of the public. If they do not, then it is not an additional burden; if they do, it is.

It has been almost universally held, we think, that an ordinary street railway, whose cars were moved by horses, was not an additional burden. See, among others, the following authorities:

Attorney General v. Railroad Co., 125 Mass. 515; *Citizens' Coach Co. v. Camden Horse R. Co.*, 33 N. J. Eq. 267; *Hobart v. Railroad Co.*, 27 Wis. 194; *Texas & P. Ry. Co. v. Rosedale St. Ry. Co.*, 64 Tex. 80; *Elliott v. Railroad Co.*, 4 Am. Elect. Cas. 449, 32 Conn. 579. These decisions rest upon the principle that the street was originally dedicated to the public for the purpose of travel thereon; that a car is a vehicle, the same as a coach or a wagon; and that the track of a street railway company is laid upon a level with the surface of the street, and in such manner as not to obstruct the street, and prevent people from freely passing and repassing thereon. In other words, the horse car and its track is not a continued exclusive appropriation of any part of the street, to the continued exclusion of the rest of the public from that part of the street.

It is quite generally held that an ordinary steam railroad in a city street or country highway constitutes an additional burden; and this is because the track of a steam railroad is of such a nature, and so constructed, that it exclusively and continuously occupies a portion of the street or highway, to the continuous exclusion of the rest of the public from such part of said street or highway. See, among others, *Railroad Co. v. Ingalls*, 15 Neb. 123, 16 N. W. 762; *Railroad Co. v. Hartley*, 67 Ill. 439, and cases there cited.

Railroad cars are as much vehicles for the transportation of passengers, enabling the public to pass and repass from one part of the city or country to another, as are horse cars or carriages and buggies; but the rails of an ordinary railroad are laid upon ties, and these rest upon an elevation, and the railroad is of such a nature and construction that it obstructs the street or highway in which it is placed, and debars the rest of the public from the use of that part of the street or highway occupied by its track.

It is also very generally held that telegraph and telephone poles in city streets or rural highways constitute additional burdens, entitling the abutting property owner to compensation.

See, among others, the following cases so holding: *Telegraph Co. v. Barnett*, 107 Ill. 507; *Telephone Co. v. Mackenzie*, (Md.) 3 Am. Electl. Cas. 196, 21 Atl. 690; *Telegraph Co. v. Smith* (Md.), 18 Atl. 910; *Telegraph Co. v. Williams* (Va.), 3 Am. Electl. Cas. 184, 11 S. E. 106; *Eels v. Telegraph Co.*, 5 Am. Electl. Cas. 92, 143 N. Y. 133, 38 N. E. 202.

The principle upon which all of these cases rest is the sound one, that the highway or street is dedicated to the public for the purpose of enabling the public to pass and repass thereon, and that the erection of the poles in the streets by the telephone or telegraph companies is a permanent and exclusive occupation of the streets by such companies, to the continued exclusion of the remainder of the public, and in that sense the poles are a continued obstruction in the streets. The Supreme Court of Pennsylvania, in *Pennsylvania R. Co. v. Montgomery County Pass. Ry. Co.*, 5 Am. Electl. Cas. 166, 167 Pa. St. 62, 31 Atl. 468, held that an electric street railway such as the one involved in this case, built in a public highway outside of the city, was an additional burden, entitling the adjacent owner to damages.

We think that the poles and wires of the electric railway company are an additional servitude, or constitute an additional burden, upon the streets in which they are placed, and that the abutting lot owners of such streets are entitled to whatever damages their property has sustained by reason thereof.

2. Thus far we have considered this case with reference to the question as to whether the original dedication made of the street contemplated that the city might use or authorize the use of the streets for the purpose of placing poles and wires therein in connection with the operation of a railway. But our constitution (art. 1, sec. 21), provides that the property of no person shall be taken or damaged for public use without just compensation. The writer is of opinion that if it be assumed that the original owner of this street, in dedicating it to the public, contemplated that it might be used for the erection of poles and wires therein, in connection with the operation of a passenger street

railway, nevertheless if the city in applying the street to that use, or authorizing it to be so applied, damages the property of the adjacent owner, he is, by virtue of the constitution, entitled to damages. This court, and nearly all other courts in which the State constitution is like ours, has held that an abutting lot owner is entitled to compensation if his lot is depreciated in value by reason of the changing of the grade of the street in front of it. Now when the land owner plats it into an addition to a city, and leaves a space for a street, he not only dedicates that space to the public for the purpose of a street, but he knows, or must know, that the municipality may work such street, keep it in repair, pave it, grade it, curb it, and may change the grade. And, where the courts have awarded damages to abutting lot owners because of a change in the grade of a street, it has not been upon the principle that such a change of grade was not contemplated at the time the grant was made, but it has been because of the constitutional inhibition that the public for its use shall not damage the citizens' property without compensation. Such is *City of Elgin v. Eaton*, 83 Ill. 535. Most of the old constitutions contained a provision that private property should not be taken for public use without just compensation, and it was quite generally held by the courts that this provision of the constitution did not entitle an abutting lot owner to compensation for damages which his property had sustained by reason of a change of grade in the street. These cases rest upon the principle that a change of grade of a street was within the purview of the original grant of the land for the street. Suppose that A., owning a block in a city, shall deed one-half of it to that city for any public purpose; by such a grant the city may devote that to any city purpose it may choose, and A. could not be heard to say that the purpose to which the city had devoted the grant was not within it. But, nevertheless, if the city in the use it makes of the granted property, shall injure the remainder of A.'s property, it would be liable for the damages, because, in accepting the grant, it did so subject to the constitutional pro-

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vision; and, though it might devote it to any public purpose it chose, yet if, in so doing, it damages A.'s property, or any other citizen's property, it must make good such damages. It seems to me, therefore, that, in order to enable the plaintiff in error in this case to recover damages from the street railway company, it is not absolutely essential that the poles and wires of the street railway company should be held, as a matter of law, to be an additional burden upon the easement.

3. The petition in this case alleges that the permanent existence in the street opposite this property of the poles and wires of the railway company interferes with the plaintiff's ingress and egress to and from her property, and have depreciated its value. Are these facts evidence competent to go to the jury for the determination of the question as to whether the plaintiff's property has been damaged, within the meaning of the constitution just quoted?

.
Applying the principles enunciated in the foregoing cases to the facts of the case at bar, we are of opinion that, if Jaynes' property is depreciated in value by reason of the exclusive use of a part of the streets in front thereof by the railway company's poles and wires, and the continued presence in such streets of said poles and wires, she is entitled to compensation for such damages. As an abutting property owner, she has the right to free ingress and egress to and from this property and to and from the street; a right to an unobstructed view of the property from the street, and an unobstructed view of the street from the property; and if poles and wires of the railway company in the street in front of this property permanently and continuously infringe these rights, and she is damaged thereby, she is entitled to compensation therefor. If a railway company, without responsibility to the abutting lot owner, may build and maintain in the street one track, it may construct and maintain any number. If it may with impunity place and maintain in the street in front of the lot owner's property poles 50 feet apart, it may

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place them 5 feet apart, or closer, until the premises, with its poles and wires in front of it, will resemble the pictures one sees of the staked corral of the South African Zulu. Such a staking in of the premises would, of course, impair their value, and yet the difference in the case supposed and the one under consideration is one of degree only. This difference does not affect the owner's right of action, but goes only to the quantum of his damages. What acts, omissions, facts, or circumstances are competent evidence of damages to be considered by a jury are questions of law for the court; but whether such acts, omissions, facts, and circumstances affect an owner's property, and damage it, and the amount of such damages, are for the jury. The judgment of the District Court is reversed, and the cause remanded, with instructions to overrule the demurrer of the street railway company, and permit it to answer. Reversed and remanded.

IRVINE, C., not sitting.

RYAN, C., wrote, concurring with the prevailing opinion, because of the obstruction of access to plaintiff's property by poles and wires of the defendant.

NOTE.—See note 2 at end of Part II.

NICHOLAS ZEHREN V. MILWAUKEE ELECTRIC RAILWAY & LIGHT
COMPANY.

CHARLES ROBBAN V. SAME.

Wisconsin Supreme Court, March 22, 1898.

(99 Wis. 83.)

ELECTRIC STREET RAILWAY IN COUNTRY HIGHWAY.—NEW BURDEN.

An electric passenger railroad upon a country highway, whether or not the railroad be interurban, constitutes an additional burden which entitles the abutting owner to compensation for injury sustained.

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Independent of the above, the abutting owner is entitled to compensation if his right of access be impaired.

Cases of this series cited in opinion: *Jaynes v. Omaha St. Ry. Co.*, vol. 7, p. 328; *Detroit City Ry. Co. v. Mills*, vol. 3, p. 333; *Penn. R. Co. v. Montgomery Co. Pass. Ry. Co.*, vol. 5, p. 166.

Appeals by defendant from orders of the Superior Court of Milwaukee denying motions to vacate temporary injunctions.

These are two actions in equity brought to permanently enjoin the defendant railway company from grading down the highway in front of the residences of the plaintiffs, and from laying an electric street railway thereon. The cases are identical in their facts, and but one statement will be necessary. The facts appearing by the complaint and the affidavits used upon the motion to dissolve the preliminary injunction were substantially as follows: Oakland avenue is a highway 60 feet in width, and running north and south in the city of Milwaukee, and extends northward into the town of Milwaukee and reaches the village of White Fish Bay, which is an incorporated village of four or five hundred inhabitants, whose southern boundary is about one and one-half miles north from the northern boundary of the city of Milwaukee. The plaintiffs own, respectively, two small lots, on which they reside, fronting on the east side of this highway, about one-quarter of a mile north of the city limits of Milwaukee. This highway has existed and been traveled by ordinary travel for many years, during all of which time there has been a grade in front of the plaintiffs' lots, ascending to the north about one foot in twenty-one, and the plaintiffs' lots are now four or five feet above the grade. This grade extends for a distance of 800 feet along the highway, and for an additional 300 feet there is a grade of one foot in thirty feet. Most of the property on the highway from the city limits north past the plaintiffs' lots has been platted into city lots, and many of the lots have been sold; but the greater part of them are held by nonresident owners for sale, and are not occupied or improved. There are about 25 actual residents upon the road from the

limits of the city to the limits of White Fish Bay. The village of White Fish Bay is composed largely of people doing business in Milwaukee. The defendant owns and operates substantially the entire electric street railway system of the city of Milwaukee, and carries passengers only. In the summer of 1897 many of the inhabitants of White Fish Bay desired an extension of the defendant's electric street railway on Oakland avenue to the village of White Fish Bay; and the defendant was desirous of making that extension, but it declined to build the line unless the street grade above mentioned was considerably reduced; and after negotiations with the town board of the town of Milwaukee, a written agreement was made between the defendant and the town board, August 17, 1897, by which the defendant was allowed to build its electric road for passenger service upon Oakland avenue, past the plaintiffs' premises, and to operate it under certain conditions for 50 years, provided that it would grade the highway at its own expense, and save the town harmless from all damages by reason of the change of grade, such new grade being made according to a profile attached to the agreement. By this agreement and profile the highway was to be cut down in front of the plaintiffs' lots, and for a long distance on either side of them, and was to be filled in at other places, so as to reduce the grade. The depth of the cut in front of the plaintiffs' premises was about eight feet, and the width of the cut at the bottom thirty-six feet, with the sides sloping back on each side to the street line. Afterwards, on October 16th following, the town board made an order fixing the grade of the street as indicated in the profile. A large proportion of the property owners on the highway along the line of the proposed change consented, in writing, to the change; but others, including the plaintiffs, did not consent. By the change proposed, the lots of the plaintiffs were to be left from twelve to fourteen feet above the roadbed, and access to them by team will be either entirely cut off or made very difficult. A temporary restraining order was obtained upon the complaint, and

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accompanying affidavits in each case at the commencement of the actions. Afterwards the defendant appeared, and, upon affidavits, moved in each case to vacate the order, which motions were denied, and the defendant appeals in both cases.

Miller, Noyes, Miller & Wahl, for appellant.

O'Connor, Hammel & Schmitz, for respondents.

WINSLOW, J. (after stating the facts): The defendant proposes to construct and operate an electric street railway for the carriage of passengers upon a highway in a country town outside of the city limits of Milwaukee, and, for that purpose and by permission of the town authorities, to cut down the highway about eight feet, so that an abutting owner's right of access to his property will be seriously impaired; and the question is whether this can be done without the consent of the abutting owner, and without the payment of compensation to such owner. The question is a new one in this court, and one the importance of which, in view of the rapid development of electric power as a means of carriage for long distances, can hardly be overestimated. If the highway in question in this case can be so used, the question at once arises whether every country highway may not be used in the same way. If it be said that the highway before us in this case is in effect a city street because of its close proximity to the city, and because the adjoining lands are platted, and because it connects a suburban village with the city, and that a clear distinction ought to be drawn between such a highway and the ordinary country road in farming districts, the inquiry will then be: Can such a distinction be practically drawn, and can it be satisfactorily applied, and upon what solid grounds will it rest? A distinction so important must in reason be one which can be drawn with some reasonable degree of certainty in every case, and must be capable of practical application. Is the line to be drawn according to density of population, and, if so, what degree of density is to be the test? Is it to de-

pend upon the activity and hopefulness of adjoining landowners in platting their land into building lots, or upon the question whether a neighboring village or town can properly be called a suburb of the principal city? Or is it to depend upon a judicious consideration of all these conditions massed together, and upon a conclusion to be evolved from the entire mass, which will determine the answer to the question in each particular case, but in no other? Or, on the other hand, must it be held that, in order to make a highway a city street, it must lie within the corporate boundaries of the city, and that outside of those boundaries no reasonable or practicable distinction can be drawn based either on proximity to the city, or on platting of lands or density of population, or upon the fact that the highway connects the city with a neighboring suburban village? These are all important questions, which, as before indicated, are new in this court, and demand careful consideration.

It was long ago held by this court, following the well-nigh universal current of authority, that a horse railway constructed upon grade in a city street, and by permission of the city authorities, was not an additional burden upon the fee, and that the adjoining landowner was not entitled to compensation therefor. *Hobart v. Railroad Co.*, 27 Wis. 194. In a recent case it was further held by this court that an electric railway constructed under a charter authorizing it to carry passengers, merchandise, baggage, mail, and express matter, and running from city to city, was not a street railway, within the meaning of the Hobart case, so far as it passed over the highways of intervening country towns, and that it could not use such highways without the consent of or compensation paid to the owners of the abutting real estate. *Chicago & N. W. Ry. Co. v. Milwaukee R. & K. Electric Ry. Co.*, 95 Wis. 561, 70 N. W. 678. No other decisions directly bearing on the controversy before us now have been made in this court, and it is manifest that neither of the cases referred to is decisive of the questions here involved. In other courts there have been decisions holding more or less

directly that an electric street railway upon a city street constructed with poles and a trolley wire stands in the same legal situation as a horse railway, and does not constitute necessarily an additional burden to the fee. These cases will be found cited in the note to section 83 of Booth on Street Railways, although it is entirely clear that the cases cited do not support the broad proposition which the writer lays down. Most of these cases were reviewed by RAGAN, J., in *Jaynes v. Railway Co.* (Neb.), 7 Am. Electl. Cas. 328, 74 N. W. 67, and it is not deemed necessary to review them in this opinion, as the question is not before us. The Nebraska case cited seems to reach the conclusion that if an electric street railway on a city street moves its cars without occupying permanently any part of the street with poles or wires, as, for instance, by storage batteries, it does not constitute an additional burden simply because the motive power is electricity; but that the planting of poles in the street, so as to interfere with an abutting owner's right of access to his property, will constitute an additional burden, for which compensation must be made. We have been referred to no case which squarely holds that the mere fact that the cars upon a street railway in a city street are propelled by electricity by the overhead trolley system, instead of by animal power, makes the railway, as a matter of law, an additional burden, although very vigorous dissenting opinions to that effect may be found in the case of *Railway Co. v. Mills*, 3 Am. Electl. Cas. 333, 85 Mich. 634, 48 N. W. 1007.

The question has not been presented to this court, and hence has not been decided, and cannot be decided now. The question here presented is whether such a railway is an additional burden when it is to be operated upon a highway in a country town, and when, also, the railway company proposes to grade down the highway for the purpose of laying their track to such an extent as to seriously impair the right of access of adjoining lot owners. It is very evident that this last-named consideration is an important one. Conceding for the moment that the high-

way should be treated as a city street, and that an electric trolley system operating upon grade upon such a street is not an additional burden upon the fee, still it has not been yet held by this court that the public authorities could lawfully authorize a street railway company to grade down a street for the express purpose of laying its tracks and operating its road to the impairment of the abutting owners' right of access. It was said in *Hobart v. Railroad Co.*, *supra*, that a horse railway upon a city street was not an additional burden "except when some private right of such an owner (as his free access to his own land or buildings) has been materially impaired thereby;" and this is certainly in accord with the authorities. Now, it appears very conclusively here that the proposed grading of the highway is about to be done by the defendant company, by consent of the town authorities, for the express purpose of enabling the company to successfully build and operate its street railway. One of the officials of the company, whose affidavit was used upon the hearing of the motion, deposed that the defendant's cars could not be practically or economically operated over the highway if the grade were not changed, and that the company had always refused to extend its line on that account, and that, before it consented to extend its line, it insisted that the new grade be established. It was evidently solely in consequence of this demand by the street railway company that the town authorities made the agreement with the company, binding it to do the grading at its own expense, and to hold the town harmless from all claims for damages resulting therefrom. There does not seem to have been any other demand that the grade be changed. The highway had been in use for many years, and had sufficed for all ordinary purposes of travel; and it is evident that the change was to be made simply to meet the requirements of the street railway service, and in pursuance of the demand of the company. It is, of course, true that the bed of the highway, when graded, would have a somewhat easier grade for the uses of ordinary travel, but that seems to have been merely an incidental

result. The object aimed at was to fit the highway for the corporate uses of the street railway company, and hence it was very reasonably insisted by the town authorities that the railway company, being the beneficiary, should defray the expense. This being so, the question is whether in fact the railway company is not about to materially impair the right of access of the adjoining lot owners by the construction of its railroad, within the meaning of the decision in the Hobart case, and whether it can do so without compensation.

It is said on behalf of the company that the town board has full power to change the grade of the highway at pleasure, and without payment of compensation to lot owners, and that the company is simply acting as the agent or employee of the town board in doing the grading, and hence that such grading cannot be considered as any part of the construction of the railroad, but rather the exercise of the power of the town to grade highways. It has been held in this State that cities and other municipal corporations which are endowed with power to fix and change the grades of streets are not liable to adjoining lot owners for such changes, in the absence of express statutory provision for compensation. This principle is so well established that it is unnecessary to cite authorities in its support. The assumption that town boards have the same broad powers as to the grading of highways as are generally conferred upon the authorities of cities is somewhat doubtful, to say the least, if not unwarranted by the provisions of the statutes. It is true that town boards have the care and supervision of the highways and bridges of the town, and it is their duty to see that they are kept in repair, and that obstructions are removed. They are also required to divide the town into road districts, and levy highway taxes, and to require the overseers of highways to perform their duties, and they have power to lay out new highways. Rev. St. sec. 1223, as amended by chapter 103, Laws 1885. These comprise the general duties of the town boards as to highways, and we are not referred to any section empowering the board to

make any such radical change of grade as was attempted here, in the absence of some showing that such grading was necessary in order to make the highway safe for travel. Doubtless, the board may make such changes in the surface of the road as will make it safe for travel, because they are charged with the duty of providing reasonably safe highways, and they must, of course, possess powers broad enough to carry out this very important duty; but, when it cannot be shown that a change is necessary to accomplish this purpose, the question as to their power to make a change prejudicial to the adjoining property owners seems doubtful. We do not, however, decide this question, because we do not deem it necessary. Grant, if you please, that the power exists; still it is entirely certain that it is a power to be exercised solely for the public good, and not for the benefit of a private corporation or individual. Upon this subject the following very pertinent remarks are made in Elliott, Roads & S., p. 558, note 4: "The rule that municipal corporations may change the grades of streets at pleasure is, at best, not easily defended, and to so extend it as to make it work for the benefit of a private corporation at the expense of a property owner is giving a harsh rule an application that it should never receive. . . . We do not believe that the discretionary power to change grades of streets exists where the change is solely for the benefit of a private corporation or individual. We cannot avoid the conviction that the courts may inquire whether the change is for municipal purposes or exclusively for the benefit of a private corporation, and, if they find that it is solely for the benefit of such corporation, they may rightfully interfere." These views seem to us reasonable and just. In the present case it is certain that the attempted change of grade was made at the demand of, and primarily for the sole benefit of, the street railway company. No fact could be more clearly proven than this fact is in the case. Whatever small benefits the general public may receive in the way of an easier grade for vehicles or the privilege of riding upon the electric cars are merely incidental to the

main object. That main object was and is the pecuniary benefit to the street railway company arising from the operation of street cars over the highway, which was impracticable before the change, and will be practicable after the change. The town authorities had no intention of grading the street, and the public did not demand it. We believe public powers which are held in trust to be exercised for the benefit of the whole people ought not to be, and cannot be, farmed out to an individual for his own especial benefit, when private rights are thereby invaded. Such proceedings seem to us clearly against public policy. The vice lies not in the fact that the work is physically done by the street railway company instead of by employees of the town (the town may probably choose its own agents, to whom it may intrust the performance of lawful public works), but the vice lies in the fact that the work itself is primarily and essentially private work, done by a private corporation, for the advancement solely of its own ends, and is not a work demanded by the public, or which would be undertaken by the town as a necessary public work.

The question is certainly not free from difficulty. It is stated in Booth, St. Ry. Law, sec. 92, that if a street railway company, acting under authority of the city council in laying its tracks, changes the grade of a street to conform to a new grade established by the municipality, and does the work properly and skillfully, as directed by the city authorities, it will not be liable to an abutting owner for incidental damages. The cases cited in support of the doctrine seem to be cases where the city, acting in exercise of its undoubted powers, has fixed the grade of a street for the benefit of the whole public, and thereafter the railway company has built its road and done the necessary grading to put its tracks upon the legal grade. *Briggs v. Railroad Co.*, 79 Me. 363, 10 Atl. 47; *Railway Co. v. Early*, 46 Kan. 197, 26 Pac. 422. Such cases are manifestly not this case. It is very certain that a street railway cannot change the grade of a street to suit itself, and thereby injure the property owner's

right of access to his property. Booth, St. Ry. Law, sec. 91; *Nichols v. Railway Co.*, 87 Mich. 361, 49 N. W. 538. Regarding the change of grade here to be made as substantially a change made by the railroad company for its own ends, and purely to enable it to operate its road successfully, we are unwilling to subscribe to the doctrine that the mere consent of the town authorities will free the railway company from liability to the adjoining property owner whose property will be rendered practically inaccessible. We regard it as clear that the abutters' right of access has been cut off by the building of the road and the necessary acts connected therewith, and not by the merely nominal act of the town board in attempting to fix the grade at the request and for the sole benefit of the street railway company.

There is, however, another question in the present case, which is much broader in its scope, and which is becoming a more pressing question every day; and that is the question whether passenger railroads operated by mechanical power can be laid over country highways without consent of, or compensation paid to, the adjoining landowner; or, in other words, are they additional burdens to the fee? The development of electric railways and motors is so rapid that this question should, if possible, be settled, as the day is evidently not far distant when such passenger railways running from city to city will be numerous, and extend to all parts of the State. It is well settled that a horse railroad upon a city street, built upon grade, and for the carriage of passengers only, is not an additional burden. The drift and weight of authority in other States seem to be also that the operation of the road by electricity or other mechanical power does not change the nature of the road in this respect, although it is also held by some other courts that, if permanent erections in the street interfering with the right of access are necessary for the operation of the road, these may constitute an additional burden. This court, however, has not passed upon these questions; and, however they may be decided,

the result would not necessarily determine the status of a country road in these respects.

That there are many and marked differences between the uses to which a city street is put and the uses to which a country highway is put cannot be denied; nor can it be denied that the uses contemplated when the land is taken vary widely, except that both are intended for purposes of travel. The street railway in its inception is a purely urban institution. It is intended to facilitate travel in and about the city, from one part of the municipality to another, and thus relieve the sidewalks of foot passengers and the roadway of vehicles. It is thus an aid to the exercise of the easement of passage; strictly, a city convenience, for use in the city, by people living or stopping therein, and fully under the control of municipal authorities, who have been endowed with ample power for that purpose. This strictly urban character of the street railways remained practically unchanged for many years, and during these years the long line of decisions grew up recognizing the street railway as merely an improved method of using the street and rather as a help to the street than as a burden thereon. Time, however, has made changes in conditions. New motive power has been discovered, and it is found that by its use an enlarged city street car may profitably run long distances, and compete to some extent with the steam railway. It is proposed to convert the city railways into lines of passenger transportation, covering long distances, and connecting widely separated cities and villages, by using the country highways, and operating long and heavy coaches, sometimes made up into trains of several cars. Thus, the urban railway has developed into the interurban railway, and threatens soon to develop into the interstate railway. The small car which took up passengers at one corner, and dropped them at another, has become a large coach, approximating the ordinary railway coach in size, and has become a part, perhaps, of a train which sweeps across the country from one city to another, bearing its load of passengers ticketed through, with an occa-

sional local passenger picked up on the highway. The purely city purpose which the urban railway subserved has developed into or been supplanted by an entirely different purpose, namely, the transportation of passengers from city to city over long stretches of intervening country. When this train or car, with its load of through passengers, is passing through a country town, it is clearly serving no township purpose, save in the most limited sense. It is very difficult to say that this use of a country highway is not an additional burden. It is built and operated mainly to obtain the through travel from city to city, and only incidentally to take up a passenger in a country town. This through travel is unquestionably composed of people who otherwise would travel on the ordinary steam railroad, and would not use the highway at all. Thus, the operation of this newly-developed street railway (so called) upon the country road is precisely opposite to the operation of the urban railway upon the city street. It burdens the road with travel which would otherwise not be there, instead of relieving it by the substitution of one vehicle for many. However we regard this development of the urban into the interurban railway, it seems utterly impossible and illogical to say that it is essentially the same in its purpose or effects as the mere street railway, which was held in the *Hobart* case not to be an additional burden on the fee. The reasons given for that holding in that case either do not apply at all, or only in a very limited degree, to the interurban railway. The difference is not so much in the change of motive power, but in the entirely different character of the use. Suppose a steam railway corporation were organized to carry passengers only from city to city, and should attempt to lay its track upon the country roads without compensation; is there any doubt but that it would be held that it could not do so? We think not. Our conclusion is that on interurban electric railway, running upon the highways through country towns, is an additional burden upon the highway. *Pennsylvania R. Co. v. Montgomery Co. Pass. Ry. Co.*, 5 Am. Electl. Cas. 166, 167 Pa. St. 62, 31 Atl. 468.

But it is said that a distinction should be drawn between a highway in close proximity to a city, or running between the city and a neighboring suburb, and the ordinary country road through a farming district. The suggestion is not without weight. There is much difference between the practical uses to which the two highways are generally put. The suburban highway very frequently approximates closely to the city street. But, as indicated at the outset of this opinion, the difficulty in drawing any clear line of demarkation between the two is very great. If a line be drawn in one case upon the facts in that case, depending upon mere proximity, or upon the manner of use, or the density of population, or the prospect of rapid settlement, or upon all of these circumstances together, it cannot apply to any other case; and the question will always be one of doubt and embarrassment, leading to different conclusions in different courts. Such a condition of the law is to the last degree undesirable. The legislature, by chapter 175 of the Laws of 1897, has provided that such corporations may condemn lands necessary for their use, but has further provided that the act should not apply to streets in an incorporated city. In thus clothing street railway companies with the power to condemn as to all property except streets within city limits, the legislature seems to have indicated its conclusion that the city line was the proper line of demarkation, and that within that line, at least, condemnation of a street was unnecessary. While this legislative idea has no binding force in determining the question of additional burden, it may justly be considered by the court which is called upon to pass upon a question beset with so much difficulty. If the line be fixed at the limits of the corporation, it will at least have the great merit of certainty, and be capable of unerring application. Presumably the city limits include the entire urban area, and we feel, under all the circumstances, that it is the true and proper line.

We are not unmindful of the fact that the questions discussed in this opinion are vexed questions, upon which there has

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been much contrariety of opinion in the various courts of the country, and that the law is only in process of settlement, and must continue in that condition for years. In endeavoring to draw the line between the public right or passage, upon the one side, and the rights of the private owner, on the other, great care is manifestly needful that neither be sacrificed nor unduly magnified at the expense of the other. We held in the case of *Chicago & N. W. Ry. v. Milwaukee, R. & K. E. Co.*, 95 Wis. 561, 70 N. W. 678, that an electric railway for the carriage of passengers, freight, and express matter between cities constitutes an additional burden upon the highway in a country town through which it passes. We hold in this case that an electric passenger railroad upon a country highway falls under the same rule. Both holdings seem to us to be founded upon good reason as well as authority, and we believe them to be salutary and just. Orders affirmed.

NOTE.—See note 2 at end of Part II.

SNYDER ET AL. V. FORT MADISON STREET RAILWAY COMPANY.

Iowa Supreme Court, May 10, 1898.

(105 Iowa, 284.)

ELECTRIC RAILWAY NO NEW BURDEN.—SPECIAL INJURY.

An abutting lot owner has no sufficient ground to complain of the erection and maintenance of electric street railway poles in the street in front of his premises, if they are properly placed, and this is true whether he owns the fee of the street or not; but an injunction will lie when the poles are so placed as to cause serious injury and damage to the abutting property.

Cases of this series cited in opinion: *Elliott v. Newport St. Ry. Co.*, vol. 4, p. 449; *Jaynes v. Omaha St. Ry. Co.*, vol. 7, p. 328; *Taggart v. Newport St. Ry. Co.*, vol. 3, p. 306; *Halsey v. Rapid Trans. St. Ry. Co.*, vol. 3,

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p. 283; *Lockhart v. Craig St. Ry. Co.*, vol. 3, p. 314; *Louisville Bagging Mfg. Co. v. Cent. Pass. Ry. Co.*, vol. 4, p. 202; *Detroit City Ry. v. Mills*, vol. 3, p. 333; *Cumberland Tel. & Teleph. Co. v. United Elec. Ry. Co.*, vol. 4, p. 296.

Appeal by plaintiffs from a judgment of the District Court of Lee County, sustaining a demurrer to plaintiffs' petition for an injunction.

T. B. Snyder, for appellants.

J. D. M. Hamilton, for appellee.

ROBINSON, J.: The material facts alleged in the petition, and admitted by the demurrer, are as follows: The plaintiffs have owned and occupied as a homestead, since the 1st of March, 1892, part of a lot and a dwelling house thereon situated on Broadway street, in the city of Fort Madison. The lot is bounded on the west by that street, and the house fronts thereon, and on a public park, from which it is separated by the street. The streets, avenues, parks, and lots of the city were laid out and platted under and by virtue of Act of Congress approved July 2, 1836, and an act amendatory thereof approved March 3, 1837, by the government of the United States, from which the title of the plaintiffs were derived. The defendant is a corporation organized under the laws of this State, and is engaged in operating a street railway, which is laid along Broadway street, in front of the premises of the plaintiffs. In the summer of the year 1895, electricity was substituted for the animal power which had been previously used to operate the railway. The trolley system was adopted, and, to aid in supporting the trolley wire, a pole 20 or more feet in height was placed in front of the dwelling of the plaintiffs, in that side of the street which was next to their lot. The petition alleges that the pole is an obstruction to the enjoyment by the plaintiffs of their homestead; that it is a nuisance; that there was no necessity for placing the pole where it is; that it could have been so placed

that it would not have affected the plaintiffs seriously; that, before it was erected, the plaintiffs protested against its being placed where it now is, and since its erection have offered to pay to the defendants the cost of moving it to a point near the north line of their property, but that the offer was refused; and that they have been greatly damaged by the placing of the pole where it now is, and will sustain much damage in the future if it be not removed. The petition further states that the defendant has not caused the damage which the plaintiffs have suffered, and will suffer by reason of the erection of the pole to be assessed, nor has it compensated them for such damage. The plaintiffs ask for a mandatory injunction requiring the defendant to remove the pole from their property, and particularly from the front of their dwelling house; and they ask, further, that the defendant be perpetually enjoined from erecting or maintaining the pole in front of their dwelling, and for general equitable relief. The demurrer is based upon the ground that the petition does not state facts which entitle the plaintiffs to the relief they ask.

1. The acts of Congress under which the town of Fort Madison was platted are found on pages 962-964 of the Revision of 1860. Those acts were considered in the case of *City of Dubuque v. Maloney*, 9 Iowa, 450, where it was held that the fee of the streets of a city platted and dedicated by virtue of those acts was, subject to the public easement, vested in the owners of the adjoining lots, and that the city had no right to use the streets for any purpose different from that for which they were originally designed. The same principle was approved in *Cook v. City of Burlington*, 30 Iowa, 94. In *Williams v. Carey*, 73 Iowa, 196, 34 N. W. 813, a distinction between cases when the fee to streets is in the abutting property owners and when it is in the city was noticed. It follows that the defendant in this case could not rightfully acquire from the city nor exercise rights in the street which were not authorized by the dedication of the streets, but are inconsistent with the easement granted to

the public. Section 464 of the Code of 1873 gave to cities and towns power to authorize or forbid the location and laying down of tracks for street railways on all streets, alleys, and public places. See, also, *Damour v. Lyons City*, 44 Iowa, 276. It now appears to be settled that an ordinary surface street railway operated by animal power is not a new or additional burden upon the public easement in a street, but one which the right of the public to use the street authorizes for the purpose of facilitating public travel. *Citizens' Coach Co. v. Camden Horse R. Co.*, 33 N. J. Eq. 267; *Attorney General v. Metropolitan R. Co.*, 125 Mass. 515; *Hobart v. Railroad Co.*, 27 Wis. 194; *Texas & P. Ry. Co. v. Rosedale St. Ry. Co.*, 64 Tex. 80; *Elliott v. Railroad Co.*, 4 Am. Electl. Cas. 449, 32 Conn. 579; *Carson v. Railroad Co.*, 35 Cal. 325; *Merrick v. Railroad Co.* (N. C.), 24 S. E. 667; *Cincinnati & S. G. Ave. St. Ry. Co. v. Village of Cumminsville*, 14 Ohio St. 523; *Brown v. Duplessis*, 14 La. Ann. 842; *Railroad Co. v. O'Daily*, 12 Ind. 551; *Chicago, B. & Q. R. Co. v. West Chicago St. R. Co.* (Ill. Sup.), 40 N. E. 1008; *Jaynes v. Railway Co.* (Neb.), 7 Am. Electl. Cas. 328, 74 N. W. 67; Booth, St. Ry. Law, sec. 83.

Streets are designed for public uses, among which are the construction and operation of street railways; and if they are so constructed and operated as not to affect prejudicially the rights of the public, nor to interfere with the proper use of the street by others, no burden not contemplated by the dedication of the street is placed upon it. In such cases the kind of power used in operating the railway is wholly immaterial. It is said, however, that the erection of trolley poles, and the placing of wires upon them, is a permanent obstruction of the street for the benefit of the street railway, which necessarily interferes with the proper use of the street by others. That poles and wires might be so erected and arranged as to have that effect is undoubtedly true, but the mere fact that the spaces they occupy cannot be used for other purposes does not show an improper use of the street. They are designed to aid in the rapid, convenient, and

economical transportation of persons from place to place, and thus to facilitate the use of the street by the public for whom it was intended. It is true that some authorities hold that the erection and maintenance of poles in the streets do cast a burden upon the street which it was not intended to bear. *Jaynes v. Railway Co.*, *supra*, and cases therein cited. But the greater weight of authority appears to sustain the conclusion which we reach. *Taggart v. Railway Co.*, 3 Am. Electl. Cas. 306, 16 R. L. 669, 19 Atl. 326; *Halsey v. Railway Co.*, 3 Am. Electl. Cas. 283, 47 N. J. Eq. 380, 20 Atl. 859; *Lockhart v. Railway Co.*, (Pa. Sup.), 3 Am. Electl. Cas. 314, 21 Atl. 26; *Louisville Bagging Mfg. Co. v. Central Pass. Ry. Co.* (Ky.), 4 Am. Electl. Cas. 202, 23 S. W. 592; *Railway Co. v. Mills* (Mich.), 3 Am. Electl. Cas. 333, 48 N. W. 1007; *Chicago, B. & Q. R. Co. v. West Chicago St. R. Co.* (Ill. Sup.), 40 N. E. 1008; *Cumberland Telegraph & Telephone Co. v. United Electric Ry. Co.* (Tenn. Sup.), 4 Am. Electl. Cas. 296, 29 S. W. 104; *Crossw. Electricity*, secs. 108, 109, 182, 183; *Booth, St. Ry. Law*, sec. 83. It follows from what we have said that an abutting lot owner has no sufficient ground to complain of the erection and maintenance of street railway poles in the street in front of his premises if they are properly placed, and this is true whether he owns the fee of the street or not.

Our attention is called to section 1324 of the Code of 1873, as amended by chapter 104 of the Acts of the 19th General Assembly, which relates to the erection of telegraph and telephone poles along the highways of the State, and to section 1325 of the Code of 1873, which provides for the payment of damages caused by setting poles in private grounds, but we do not find anything in these sections to conflict with what we have said. It has been held in some cases that the erection of telegraph and telephone poles in streets imposes a new burden, because they do not in any manner aid in the use of the street by the public; but, as no question of that character is involved here, we refrain from expressing any opinion in regard to it.

2. It is the duty of a street railway company to so construct and operate its railway as not to interfere unnecessarily with the right of abutting property owners to use and enjoy their property. *Cadle v. Railroad Co.*, 44 Iowa, 14; *Crossw. Electricity*, 85. A private individual may maintain an action for relief from injury to himself or his property if the injury be separate and distinct from that which affects the general public. *Churchill v. Water Co.*, 94 Iowa, 89, 62 N. W. 646. The petition in this case alleges, and the demurrer admits, that the plaintiffs have sustained serious injury from the placing and maintaining of the pole in its present location, and that the injury will continue if the pole be not removed. To show this more clearly, we set out somewhat more fully than we have already done the substance of averments contained in the petition. In addition to the platting of the town, the location of the property in question, and the adoption by the defendant of the trolley system, the petition alleges that the plaintiffs have, since the year 1892, owned and occupied as a homestead the premises described; that the defendant erected in that part of the street appurtenant to their property, and in front of their dwelling, a pole 20 or more feet in height, used in supporting its trolley wire, and similar poles at intervals on each side of the street; that the poles so erected were connected by cross wires to which the trolley wire was attached; that it was not necessary to place a pole in front of the plaintiffs' dwelling house, nor on that part of the street appurtenant to their premises; that the pole on the opposite side of the street to which the one in question is attached is from four to six feet further north than is the one in question, and, had the latter been placed three feet further north than is the one to which it is attached, it would still have been in front of the plaintiffs' lot, but not at a place where it would have damaged the plaintiffs' premises to such an extent as to be complained of; that the pole in question is a nuisance and an obstruction to the enjoyment by the plaintiffs of their premises and homestead; that it was placed where it is, not because of

any necessity, but to annoy the plaintiffs, and to injure and depreciate the value of their property, and that it had had that effect; that, before it was placed where it is, the plaintiffs protested against its erection there, and, after its erection, offered to pay the defendant the cost of moving it to a point near the north line of their property, where they would not object to it, but that the defendant declined to accept the offer; that the plaintiffs have been greatly damaged by the placing of the pole where it now is, and will continue to suffer such damage until it is removed; and that they have not been in any manner compensated for such damage.

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The petition in this case states that the pole in question was placed in front of the property of the plaintiffs without necessity therefor, to annoy them, and to injure and depreciate the value of their property; that it is an obstruction to the enjoyment by them of their property; that it has depreciated the value of that property, and caused great damage to the plaintiffs, and will continue to cause such depreciation and damage if not removed; and that they have not been compensated for the damage received. Applying the rule of the statutes and authorities cited, we conclude that the statements of the petition are of ultimate facts, which show a cause of action, although it may be true that a motion for a more specific statement as to the manner and extent of the obstruction and its effect might have been required had it been asked. But the ultimate fact was the unnecessary obstruction of the use and enjoyment of the plaintiffs' property to their substantial damage; and that the petition showed. We do not understand the appellee to question this if it be true that the pole in question may have been so placed and maintained as to give to the plaintiffs a right of action. If the plaintiffs can prove the averments of their petition, they might recover damages for the injuries sustained; but they are not compelled to resort to that remedy. If the location of the pole is not only injurious, but unnecessary, they may have

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recourse to this action for the removal of the pole. *Richards v. Holt*, 61 Iowa, 533, 16 N. W. 595; *Gribben v. Hansen*, 69 Iowa, 255, 28 N. W. 584; *Harbach v. Railway Co.*, 80 Iowa, 593, 44 N. W. 348.

We must not be understood as holding that a property owner may dictate the location of poles in front of his premises, nor that he may recover damages, however trivial, which may be caused by their location. The railway company has the right to so place its poles as to secure the best results for its railway, provided that it so places them as not to cause any unnecessary injury. The injurious consequences which it must guard against are those of a substantial character. The placing of poles in front of property is seldom desired by the property owner, and may in some slight degree interfere with the use of his property, as by obstructing the view from it; but for such injury alone he would rarely, if ever, be entitled to relief. The placing of a pole in a walk or roadway, however, or in front of and near to an important window, if the pole could as well be placed elsewhere, might afford ground for relief. But we cannot undertake to lay down general rules which would govern all cases. Each, of necessity, must be decided according to its own facts. It follows from what we have said that the District Court erred in sustaining the demurrer, and its judgment is reversed.

DEEMER, C. J., wrote dissenting memorandum.

NOTE.—See note 2 at end of Part II.

**MCDERMOTT V. WARREN, BROOKFIELD & SPENCER STREET
RAILWAY COMPANY.***Massachusetts Supreme Judicial Court, November 28, 1898.***ELECTRIC STREET RAILWAYS NO NEW BURDEN.**

In Massachusetts, the law recognizes no right of the abutting owner to compensation for the use of highways for street railways, including those operated by electricity.

A statute authorizing selectmen to assess the damages suffered by abutting owners on account of the construction of lines for the "transmission of intelligence by electricity" and of "electric light and electric power lines," does not affect electric railway lines.

Appeal by plaintiff from judgment of Superior Court, Worcester County, sustaining demurrer to declaration.

J. R. Thayer and A. P. Rugg, for appellant.

N. Sumner Myrick and J. A. Brackett, for appellee.

KNOWLTON, J.: The plaintiff's declaration is founded on an award of the selectmen of Brookfield assessing damages, on the plaintiff's petition, against the defendant corporation, for the construction of an electric railway in the usual manner along and upon the highway opposite the plaintiff's land. The defendant demurred to the declaration, and the principal ground of the demurrer is that the selectmen had no jurisdiction to entertain the plaintiff's petition and make an award in her favor. The principal question in the case is whether Pub. St. c. 109, sec. 4, amended by the statute of 1884 (chap. 306), is applicable to ordinary street railways which use electricity as a motive power. This chapter of the Public Statutes, prior to its amendment, related only to "companies for the transmission of intelligence by electricity." The amendment above referred to extends the provisions of section 4, allowing the assessment of damages in certain cases, to "electric light and electric power lines." At the time of the enactment of this amendment, elec-

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tric railways were not known, or at least were not in common use. In the statute as amended there is no reference to street railways. The statute in regard to street railways is Pub. St. c. 113, and it contains elaborate provisions authorizing the construction and operation of such railways. By section 39 of this chapter it is provided "that a street railway may use such motive power on its tracks as the board of aldermen of cities or the selectmen of towns through which it is located may from time to time permit." Under this provision, in recent years street railways generally have adopted electricity as their motive power. In *Howe v. Railway Co.*, 167 Mass. 46-48, 44 N. E. 386, 387, it is said that "the statutes of the commonwealth make no provision for compensation to abutters when an electric railway is laid in a public way," etc.; and we are of opinion that the legislature did not intend by St. 1884, c. 306, sec. 1, to abridge the rights of street railway companies, or to affect them in any way. It seems, rather, that companies for the production and sale of electric power or of electric light were intended to be brought within the provisions of the statute. While electric railways use electric power, they are not properly called electric power companies. Their use of power is only in their own business of maintaining and operating railways for the transportation of passengers or freight. In the same way they use electric light for the illumination of their cars, but they are not for either of these reasons electric power companies or electric light companies. They are not in the business of manufacturing or furnishing electric power or electric light for others. We are of opinion that the statute relied on is inapplicable to the facts stated in the petition, and that it gives the selectmen no jurisdiction to act upon the petition. It follows that their action was without warrant in law and that their award was void. *Lawrence v. Smith*, 5 Mass. 362; *Riley v. City of Lowell*, 117 Mass. 76; *Custy v. City of Lowell*, id. 78.

Judgment affirmed.

NOTE.—See note 2 at end of Part II.

LA CROSSE CITY RAILWAY COMPANY v. E. C. HIGBEE.

Wisconsin Supreme Court, September 25, 1900.

(107 Wis. 389.)

ELECTRIC STREET RAILWAY NO ADDITIONAL BURDEN.

(Head-note by the Judge):

The rule as regards whether a street railroad is an additional burden on the fee title to the street on which it is located, established in *Hobart v. Railroad Co.*, 27 Wis. 194, applies to street railroads operated by electric power communicated by means of a trolley wire supported over the track by cross wires attached to poles set in the streets near the outer edge of the sidewalk lines, so far as the construction and operation of such roads fall within the principle of such case.

The doctrine of *Krueger v. Telephone Co.* (Wis.) 7 Am. Electl. Cas. 285, namely, that any new use of a street which to any extent requires a permanent occupancy thereof is an additional burden on the fee, applicable to telephone lines, does not apply to electric street railroads, because such railroads are but an improved method of using the street to effect its original design. The two doctrines divide on whether the use of the street is new, having regard to the original purpose thereof, or the use is only a new mode of devoting the street to public travel, its original purpose.

The principle of *Hobart v. Railroad Co.* may be stated as follows: A railroad, constructed on the grade of a street and operated so as not to materially interfere with the common use thereof for public travel by ordinary modes, or with private rights of abutting land-owners, and for the purpose of transporting persons from place to place on such street at their reasonable convenience, is not an additional burden on the fee thereof.

A railroad satisfies the above essentials, regardless of the motive power used or how it is applied, if it be strictly a street railroad for the carriage of passengers on the street, taking them on and discharging them at reasonable points, and it be so constructed and operated as not to materially interfere with the ordinary modes of using the street for public travel or with private rights.

A supporting trolley-wire pole, set in a street in front of the sidewalk, does not violate the above rule if it be placed with reasonable regard for the convenience of the owner of the fee of the land on which it is located, and so as not to materially interfere with access to his lot outside the street line.

Cases of this series cited in opinion: *Krueger v. Wisconsin Teleph. Co.*, vol. 7, p. 285; *Zehren v. Milwaukee Elec. Ry. & L. Co.*, vol. 7, p. 345;

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Williams v. City Elec. Ry. Co., vol. 3, p. 231; *Jaynes v. Omaha St. Ry. Co.*, vol. 7, p. 328; *Louisville Bagging Mfg. Co. v. Cent. Pass. Ry. Co.*, vol. 4, p. 202; *State, Roebling, Pros., v. Trenton Pass. R. Co.*, vol. 6, p. 137; *Detroit City Ry. v. Mills*, vol. 3, p. 333; *Taggart v. Newport St. Ry. Co.*, vol. 3, p. 306; *Halsey v. Rapid Trans. St. Ry. Co.*, vol. 3, p. 283; *Lockhart v. Oraig St. Ry. Co.*, vol. 3, p. 314; *Cin. Inc. Pl. Ry. Co. v. City, etc., Ass'n*, vol. 3, p. 343; *Dean v. Ann Arbor St. Ry. Co.*, vol. 4, p. 172; *Ogden City Ry. Co. v. Ogden City*, vol. 3, p. 321; *Cumberland Tel. & Teleph. Co. v. United Elec. Ry. Co.*, vol. 4, p. 297.

Appeal from Circuit Court, La Crosse County.

Action to enjoin the defendant from cutting down an electric street railway pole, which was erected in the usual way at the outer edge of the sidewalk on his property, on one of the streets of the city of La Crosse, Wis. Sufficient facts are properly stated in the complaint to constitute a good cause of action against the defendant, if electric street railroad poles may be legally placed in a city street, when so located as not to materially interfere with public travel, or access to and egress from abutting property, without the consent of the owner of such property, or his being compensated for a taking of his property for the public use. The defendant interposed a general demurrer to the complaint, which was sustained, and plaintiff appealed.

Losey, Woodward & Lees, for appellant.

Higbee & Bunge, for respondent.

MARSHALL, J.: The decision appealed from, as we are informed, was made on the theory that the case is controlled by the conclusion reached in *Krueger v. Telephone Co.* (Wis.), 7 Am. Electl. Cas. 285, 81 N. W. 1041, regarding the right to maintain telephone poles in public highways without the consent of abutting property owners, and the reasoning that led to such conclusion. Counsel for respondent urge the same view in this court, so we are confronted at the outset with the question of whether the point now presented has been in effect decided and the law in regard to it established for this State against appellant's contention to the effect that an electric railway pole in a

city street, properly placed, is not an additional burden upon the fee title to the land over which the street is laid.

We shall not discuss at any great length what was said in the Krueger case, for the purpose of explaining and rendering the reasoning of the opinion there more clear and consistent with the conclusions here than they seem to have been to counsel for respondent and to the learned court that decided this case below. If there exist any necessity for making the opinion in the Krueger case more definite and certain, it is not perceived here. What was said there should be read and considered with reference to the points decided, upon which the final decision was grounded. Such points are, first, the law governing the right of telegraph and similar companies to erect and maintain poles and lines on public streets and highways, does not extend beyond the public right to the street, hence is subject to the private rights of the owners of the fee of the land covered by the streets, who must be dealt with independent of such law, if such poles constitute an additional burden upon such fee; second, as regards the contingency suggested, as between the rule in jurisdictions holding that any *quasi* public use of a street is permissible that is not so inconsistent with the original design thereof as to materially interfere therewith, under which telephone and telegraph lines in public streets have been held not to be an additional burden upon the fee, and the rule adopted by the great majority of courts and supported generally by law writers,—that a new mode of using a public highway so wholly different from the original mode of use as to really constitute a new use affects private rights, though such use may in some degree affect the original design of the way, if it requires to some extent a permanent occupancy of the street, regardless of whether such occupancy materially interferes with the primary use of the street,—under which rule the maintenance of telegraph and telephone poles on public streets has been held to be an additional burden on the fee, for which the abutting owner must be compensated, the court inclines to and adopts the majority rule above so far as

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relates to telephone lines. That course was followed, as was remarked, in view of the fact that the latter rule has the greater support, as indicated, and the further fact that a middle ground for street railways was adopted for this State in *Hobart v. Railroad Co.*, 27 Wis. 194. All said in the opinion as to permanent occupancy of a street by a *quasi* public corporation for a purpose not originally contemplated in the acquirement of the land covered by it for public use, being of itself a new burden upon the fee thereof, was said *arguendo*, and as mere backing for the extreme rule in favor of abutting property owners, adopted as to telephone lines, but which, as indicated in the opinion, has been, since the Hobart case, contrary to the policy of the State regarding street railways, as the opinion clearly shows.

So, as we have seen, there is nothing in the Krueger case, when rightly understood, and when, we may properly say, understood as the language of the opinion clearly indicates, to affect the question raised in this case. That is all we deem necessary to say regarding the Krueger case. It established the law for this State, governing the question presented for decision and decided, and the opinion should not be read as in any way limiting the law regarding street railways, laid down in the early case in this court.

From what has been said this case is left to turn on whether a street railroad pole, properly placed, is an additional burden on the fee of the land upon which it is located, within the principle of *Hobart v. Railroad Co.* Such principle, briefly stated, is that a railroad, constructed and operated in the street of a city at grade, so as not to materially interfere with its common use for public travel by ordinary modes, or with private rights of abutting land owners, for the purpose of transporting persons from place to place on such street at their reasonable convenience, is not an additional burden upon the fee thereof.

In *Chicago & N. W. Ry. Co. v. Milwaukee, R. & K. Electric Ry. Co.*, 95 Wis. 561, 70 N. W. 678, 37 L. R. A. 856, the court pointed out the significance of the purpose of a street railway

as indicated in the rule under consideration, namely, the carriage of passengers; also the significance of the place where such purpose may be exercised, namely, in city streets; and it was held that a railway having for its purpose the carriage of freight, a commercial railway, is not covered by the Hobart case.

In *Zehren v. Light Co.*, 7 Am. Electl. Cas. 345, 99 Wis. 83, 74 N. W. 538, 41 L. R. A. 575, the significance of that part of the rule of the Hobart case relative to where a street railway may be constructed was again pointed out and discussed, and it was held that it does not extend to a purely country highway. So it will be seen that the law governing the subject under discussion, as laid down when first considered in this court, has not since been extended or limited. No reason is perceived and none contended for, as we understand it, why such law should now be extended. The issue raised must be tested accordingly.

It is claimed by appellant that no significance should be given to the fact that in the Hobart case the motive power was obtained by the use of horses, while the contrary is urged by counsel for the respondent, attention being called to the following language of the chief justice in *Chicago & N. W. Ry. Co. v. Milwaukee, R. & K. Electric Ry. Co.*, *supra*, "There is certainly far more difference in the use of mere horse power, as in *Hobart v. Railroad Co.*, *supra*, and electric power, as in the case of the defendant, than there is in the case of electricity and steam." When that language is read with reference to the point under consideration, it will be seen that it was not intended to convey the idea that the difference between horses as a motive power and electricity is sufficient to render a street railroad an additional burden upon the fee of the land on which the street is located. The question to which the quoted language referred is, why should an ordinary steam commercial railroad company be required to pay for its right of way in the public streets, to the owner of the fee of the land upon which the railroad is constructed, and an electric street railroad company be free from that burden? The mere difference in motive power would seem

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to be insufficient, it was said; and as a further reason why mere motive power should not be the test, the idea was suggested expressed in the language which counsel for respondent deem so significant. What would be fairly gathered from all that was said on the subject is that the motive power, of itself, is not sufficient to class an electric street railway with an ordinary railroad, as regards its being an added burden upon the fee. That is in line with all or nearly all authority on the subject. *Williams v. Railway Co.* (C. C.), 3 Am. Electl. Cas. 231, 41 Fed. 556; *Jaynes v. Railway Co.*, 7 Am. Electl. Cas. 328, 53 Neb. 631, 74 N. W. 67, 39 L. R. A. 751; *Louisville Bagging Mfg. Co. v. Central Pass. Ry. Co.*, 4 Am. Electl. Cas. 202, 95 Ky. 50, 23 S. W. 592; *Roebing v. Railroad Co.*, 6 Am. Electl. Cas. 137, 58 N. J. Law, 666, 32 Atl. 1090; *Reid v. Railroad Co.*, 7 Am. Electl. Cas. —, 94 Va. 117, 26 S. E. 428, 36 L. R. A. 274; *Briggs v. Railroad Co.*, 79 Me. 363, 10 Atl. 47; *Newell v. Railway Co.*, 35 Minn. 112, 27 N. W. 839; *Nichols v. Railway Co.*, 87 Mich. 361, 49 N. W. 538, 16 L. R. A. 371; *Railway Co. v. Mills*, 3 Am. Electl. Cas. 333, 85 Mich. 634, 48 N. W. 1007; Booth, St. Ry. Law, sec. 80; Joyce, Electric Law, secs. 344, 345.

The subject last referred to has been considered by the courts of most of the States of the Union, and many of the Federal courts, with the uniform result indicated. A brief reference to particular decisions will give point to what has been said.

In *People v. Kerr*, 27 N. Y. 188, Mr. Justice EMORR, speaking for the court, said: "I do not attach any importance to the motive power. I have no doubt that steam will ultimately be applied to carriages upon common roads, and I suppose it might be used upon these iron ways without affecting the present question,"—the rights of abutting property owners.

In *Newell v. Railway Co.*, *supra*, the right to use steam as a motive power to operate street cars was sustained, the evidence showing that the motor was so designed as not, in the operation of hauling street cars, to be materially different from horse or

electric power as regards interference with ordinary public travel, or with private rights. The court said that the test to be applied, in determining whether a railway constructed on a street and operated by the use of a steam motor is an additional burden upon the fee, is whether it is in fact a "street railroad" as the term is commonly understood,—a railroad constructed and operated in aid of passenger travel on the street over which it runs, by taking on and discharging passengers at street crossings,—and whether it is constructed on the street grade and operated so as not to materially interfere with the ordinary common use of the street or with the access to abutting property. *Moses v. Railroad Co.*, 21 Ill. 516, is to the same effect.

In *Railway Co. v. Mills*, *supra*, the court considered all the elements that can be suggested why the use of electricity as a motive power should render a street railroad operated by such power different from a street railroad operated by horse power, as regards being an additional servitude upon the fee of the street owned by the abutters, and it was decided against the contentions of the abutter on all points. The decision was subsequently referred to in a case involving the same subject, and affirmed, the court remarking that there is almost a consensus of judicial opinion in that direction.

So it follows that in determining whether a street railroad is an additional burden upon the land already set aside for the public use as a highway, we are to look to the manner of its construction and use, and not to the motive power. The latter may be steam, horse, electric or compressed air power, and the road and its operation be consistent with the common public use for which the street was originally designed, and not violate private rights; and either may be so used, and the road be so constructed and operated, as to have the opposite effect. Electric railroads constructed in the usual way and operated by the use of the overhead trolley wire supported by cross wires fastened to poles set at the curb lines of the street, or otherwise located so as not to materially interfere with the ordinary common use of the street,

belong to the former class, as we shall see later; and that has become so firmly established by the courts that it cannot be considered open to serious question.

If the crucial test, to be applied in determining whether a street railway company is entitled to a free right of way along a public street as against abutting property owners, were whether a different motive power is used than was contemplated when the street right of the public was acquired, all new discoveries of improved modes of travel would require, as has often been remarked, dealing with the owners of the fee of the land on which the streets are located before the public could have the benefit thereof. When a new mode of using the public streets and highways is adopted the question arises of whether it violates the rights of the owners of the fee to the streets and is inconsistent with the original design in setting the land aside for a public thoroughfare, keeping in view the fact that such design is presumed to have contemplated the adoption from time to time of improvements in mechanical appliances and their use in aid of travel upon the street,—the keeping abreast with the march of civilization, with the growth of population and consequent increase of travel, so as to adequately satisfy public needs and conveniences. Lands are set aside for public streets and highways, not for the present, with its necessities and modes of use, but for all time, with all the added demands that may be made upon the public ways within the scope of their original design, in the course of natural development that is constantly going on. Subject to that test the traction engine, automobile, and street railways, regardless of the motive power used, are entitled to the use of the street, subject to the necessity for consent by public authority in proper cases, and reasonable police regulations.

Here, as we have seen, appellant's railroad is not outside of the Hobart case because of the motive power used. It is within the rule in that it is for the carriage of passengers and is strictly a street railway. The complaint shows that the railway was constructed by legislative authority in all respects according to the

ordinance of the city of La Crosse granting to appellant its franchises; that the poles, including the particular pole in question, were placed at the curb lines of the streets under the supervision and direction of the proper city official; and that the mode of construction adopted generally is the usual mode, where electric power is used and communicated to the car motor by means of an overhead trolley wire supported by cross wires attached to poles set at or near the curb lines of the streets. No complaint is made against the use of the streets contemplated by appellant's franchise, unless the manner in which the road is constructed on respondent's property, or the manner in which it is operated, violates private rights.

The complaint was condemned by the trial court merely because a permanent occupancy of the street, to some extent, was shown; but that is not, of itself, material in cases of street railways. As has been shown, the reasoning which the learned judge supposed he was bound by does not apply, because, unlike a telephone line, the purpose of a street railroad is within the scope of the original design of the street. Any other view would condemn *Hobart v. Railroad Co.*, and the decisions of all the courts that have sustained the rule that the use of a street for street railway purposes does not of itself impose an additional burden upon the fee. It is useless at this late day to urge that the distinction so made is unreasonable. It has the sanction of this and other courts for upwards of a quarter of a century and is not now open to question.

On the question of whether the manner in which the road, with its appurtenances, was constructed, affects the right of the defendant to recover for an additional burden upon the fee of the street, we must come down to the simple question of whether the pole, set at the outer edge of the sidewalk on defendant's premises, interferes with access to or egress from his property. We understand from the complaint that the pole was not located so as to interfere with any driveway or other avenue used for passage to or from the street to respondent's property outside of

the street line. It merely prevented a person from stepping on or off the sidewalk at the precise point where the pole was located. That is not such an unreasonable interference with private property as to violate the rule that a street railway cannot be so constructed as to interfere with access to abutting property, without the consent of the owner thereof. As well might it be said that the mere fact, that because of the location of the rails in the street one traveling with a vehicle must approach to or go from property abutting thereon at a different angle than he otherwise would, or the fact that he cannot as conveniently use the street in front of such property for ordinary temporary purposes incident to the occupancy thereof, is a violation of private rights. Interference with access to property, within the meaning of the street railway cases, means some substantial interference. *Railway Co. v. Mills*, 95 Mich. 634, 48 N. W. 1007; Joyce, *Electric Law*, sec. 380. A street railway pole, properly placed at the curb line of a street, no more interferes with access to or egress from property outside of the street line than a lamp-post or hitching post or shade tree, and no more interferes with the ordinary use of the street for public travel.

We are aware that there is at least one case, decided in a court of last resort, where a different conclusion was reached. We refer to *Jaynes v. Railway Co.*, 7 Am. Electl. Cas. 328, 53 Neb. 631, 74 N. W. 67, 39 L. R. A. 751. The opinion there shows that the subject treated did not receive careful study. The conclusion reached is contrary to all the authorities cited by the court. A very few cases were cited,—but a small fraction of those where courts have considered the subject under discussion,—yet those referred to were all the Nebraska court could find, so said in the opinion. The decision was based on the theory that any exclusive occupancy of any part of a street by a street railway, is a new burden on the fee title thereof. An effort was made to harmonize the contrary holdings in the few cases cited, with the opinion, which seems to have been successful in the judgment of the writer of the opinion, yet success was reached by the exercise of judicial ingenuity that has few parallels.

A single instance will give point to what is said in regard to the manner in which decided cases were brought into harmony with the decision of the Nebraska court. *Taggart v. Railway Co.*, 3 Am. Electl. Cas. 306, 16 R. I. 668, 19 Atl. 326, 7 L. R. A. 205, one of the leading cases on the subject, which has in a measure guided many courts, was referred to. There the plaintiff, who was the owner of property abutting on the street on which a horse railway was located, which it was proposed to change to an electric street railway operated by the overhead trolley system, desired to enjoin the railway company from erecting poles and wires in front of his property, on the ground that they would constitute an additional burden thereon. The court decided to the contrary, referring to the underlying principles of the horse railway cases to justify the conclusion reached, and saying that, "It does not appear that it (the street railway operated by electricity) occupies the streets or highways any more exclusively than if it were operated by horse power." That holding the Nebraska court quickly disposed of by the remark that, "There is no question but that the law of the case is correctly laid down, if the evidence, or the record on its face, sustains the finding of fact made by the court that the electric street railway no more exclusively occupies the street than an ordinary horse railway." There was no finding of fact involved in the case. What is referred to as a finding of fact is the conclusion of the appellate court as regards whether an electric railway, with its wires over the street supported by cross wires attached to poles set in the street, "at the front margin of the sidewalk," is an exclusive occupancy of the street so as to materially interfere with its primary use or violate private rights within the principles governing horse railway cases. The decision is directly contrary to that in the Jaynes case. The latter is out of harmony with all judicial and text-book authority. It was made, as it seems, by overlooking the distinction between a mere new mode of devoting a street to the use originally designed, which admits of some degree of permanent occupancy

of the street without compensating the owner of the fee title, and an entirely new use of the street—a use inconsistent with its original design—which does not admit of such occupancy.

If a mere challenge can raise a question for judicial consideration, however well settled the principles involved may be, we ought to go further and inquire as regards whether the manner in which plaintiff's road is operated, as shown by the complaint, justifies the conclusion that it cannot be classed with ordinary horse power railroads, respecting its effects upon private rights. That is a field that has been explored over and over again, as the cases heretofore cited indicate. It would be a work of supererogation to go over it again at this late day. No new light can be shed upon it. The question has been illumined by the wisdom of eminent judges of most of the courts of last resort in this country, and, with the single exception mentioned, so far as we can discover, the conclusion has been reached that a street railway, having its track laid so as to conform to the surface of the street, regardless of the motive power used or how applied, so long as neither private rights nor the common use of the street for public travel is materially affected, is governed by the law early laid down as to street railways operated by horse power, and that the ordinary electric street railway, with its trolley wire supported by cross wires attached to poles set near the outer edge of the sidewalks, with due regard to the abutting property owner's convenience, satisfies the essential mentioned. Such a railway is but an improved method of using the street for public travel, which was the original purpose to which it was devoted. So was the horse railroad in its day. The same principles that justify one without purchasing the right from abutting property owners, justify the other. There is no limit to the public right to use a street, and every part of it, so long as that use is in aid of public travel thereon and does not unnecessarily interfere with the common use of the way by ordinary modes of travel, and is no substantial impairment of private rights of property. An electric car, as compared with a horse car, in re-

ward to freedom from interfering with private rights, is superior as regards relieving the street, because it moves more rapidly, is started and stopped with greater facility, and will readily move the greater number of persons the greater distance in a given time. It is superior as regards actually obstructing the street because of its more rapid motion and shorter stops. These considerations, and many others that might be mentioned, have moved courts to declare the law as here indicated. The following are a few of the multitude of cases directly on the subject: *Briggs v. Railroad Co.*, 79 Me. 363, 10 Atl. 47; *Taggart v. Railway Co.*, 3 Am. Electl. Cas. 306, 16 R. I. 668, 19 Atl. 326, 7 L. R. A. 205; *Williams v. Railway Co.* (C. C.), 41 Fed. 556; *Nichols v. Railroad Co.*, 87 Mich. 361, 49 N. W. 538, 16 L. R. A. 371; *Halsey v. Railway Co.*, 3 Am. Electl. Cas. 283, 47 N. J. Eq. 380, 20 Atl. 859; *Lockhart v. Railway Co.*, 3 Am. Electl. Cas. 314, 139 Pa. St. 419, 21 Atl. 26; *Cincinnati Inclined-Plane Ry. Co. v. City & Suburban Tel. Ass'n*, 3 Am. Electl. Cas. 343, 48 Ohio St. 390, 27 N. E. 890, 12 L. R. A. 534; *Louisville Bagging Mfg. Co. v. Central Pass. Ry. Co.*, 4 Am. Electl. Cas. 202, 95 Ky. 50, 23 S. W. 592; *Dean v. Railway Co.*, 4 Am. Electl. Cas. 472, 93 Mich. 330, 53 N. W. 396; *Ogden City Ry. Co. v. Ogden City*, 3 Am. Electl. Cas. 321, 7 Utah, 207, 26 Pac. 288; *Howe v. Railway Co.*, 167 Mass. 46, 44 N. E. 386; *Birmingham Traction Co. v. Birmingham Ry. & Electric Co.* (Ala.), 24 South. 502; *Chicago, B. & Q. R. Co. v. West Chicago St. R. Co.*, 156 Ill. 255, 40 N. E. 1008, 29 L. R. A. 485; *Cumberland Telegraph & Telephone Co. v. United Electric Ry. Co.*, 4 Am. Electl. Cas. 297, 93 Tenn. 492, 29 S. W. 104; *Taylor v. Railway*, 91 Me. 193, 39 Atl. 560.

In Booth, on Street Railway Law published in 1892, after a review of all judicial authorities down to that time, the author said: "After a full consideration of the various objections raised to the use of electricity, every court of last resort to which the question has been submitted has held that the electric street railway does not constitute a new servitude," and "does not entitle abutting owners to compensation." In Joyce on Elec-

tric Law, published in June of this year, it is said that, in every State where a street railway operated by horse power has been held not to create a new burden upon the fee title to the street, entitling the owner of such title to compensation, the holding has been the same as regards an ordinary electric street railway, except in Nebraska in *Jaynes v. Railway Co.*, *supra*. In *Cumberland Telegraph & Telephone Co. v. United Electric Ry. Co.*, *supra*, a very well-considered case decided in 1893, it is said that, "with rare unanimity the courts have concurred in holding that an electric street railway, constructed and operated upon streets by means of an overhead trolley wire supported by poles, with permission of the public authorities, for the transportation of passengers only, and conforming its track to the surface of the ground, is not an additional servitude upon the fee within the streets, but a legitimate use of the streets within the original general purpose of their dedication."

The length to which we have gone in considering the question presented on this appeal is only justified by the fact that the precise question has not before been submitted to this court for decision, and was reserved for further consideration in *Zehren v. Light Co.*, *supra*, in such a way as to invite its presentation when a proper case therefor should be made up. It seems clear that in reaching a conclusion that the demurrer to the complaint was improperly sustained, the principles of *Hobart v. Railroad Co.* are followed and neither limited nor extended. It will be noted that this opinion does not lead to the conclusion that an electric street railway pole may be placed at any point in the street near the outer edge of the sidewalk without being an added burden upon the fee title. Reasonable regard must be had, in locating such poles, for the convenience of abutting property owners in the enjoyment of their property. We gather from the complaint that the pole in this case was properly placed in respect to that rule. The order appealed from is reversed, and the cause remanded for further proceedings according to law.

NOTE.—See note 2 at end of Part II.

HENRY S. EHRET V. CAMDEN & TRENTON RAILROAD COMPANY.

New Jersey Court of Chancery, November 27, 1900.

ELECTRIC STREET RAILWAY NO NEW BURDEN.

trolley railway upon a country highway is not an additional servitude upon the land of an abutting owner, who owns to the middle of the road. Cases of this series cited in opinion: *Roebling v. Trenton Pass. Ry. Co.*, vol. 6, p. 137; *West Jersey R. Co. v. Camden, etc., Ry. Co.*, vol. 5, p. 137; *Zehren v. Milwaukee, etc., Co.*, vol. 7, p. 345; *Penna. R. Co., v. Montgomery Co. Pass. Ry. Co.*, vol. 5, p. 166.

Demurrer to bill.

Charles K. Chambers and Mark R. Sooy, for complainant.

Howard Flanders, Samuel Belden, and David J. Pancoast, for defendant.

REED, V. C.: The question presented by these demurrers is whether a trolley railway upon a country highway is an additional servitude upon the land of the abutting owner, who owns to the middle of the road. The bill is filed to enjoin the construction of such a road in the front of complainant's property. From the bill it appears that the complainant owns land in the township of Beverly, in Burlington county, fronting, as described in the deed set out in the bill, 179 feet on a public road, also called "Warren street," leading from the city of Beverly to the city of Burlington. The charge is that the defendant, under certificate of incorporation under the Act of 1893, for the formation of trolley companies, and under an ordinance of the township of Beverly, is about to construct a line of passenger railway, to be operated by electricity, over the said road, and over the land of the complainant lying in said road, without making compensation to complainant. The question, then, is

whether a trolley road to be constructed under the Act of 1893 imposes a burden upon the land of an abutting owner in excess of public easement which arose by the creation of the highway. The law is settled that a trolley road in a city does not entitle to compensation. *Roebeling v. Railway Co.*, 6 Am. Electl. Cas. 137, 58 N. J. Law, 666, 34 Atl. 1090, 33 L. R. A. 129. If it imposes an additional servitude upon land over which a country highway runs, it must be because the easement in the public in the case of a highway or township differs from the easement of a street in a pure municipality; and the difference must be in respect to the propriety of the use in either highway or street of such a method of locomotion. Now, a street may be put to many uses which are disconnected from its primary purpose of offering a passage for vehicles and pedestrians. These uses spring out of the necessities of a congested urban community. It may be admitted that some or these secondary uses may be imposed upon land of an abutter upon a street without compensation, and may not be imposed upon an abutter along a highway. However that may be, I fail to perceive any difference in the easement which the public has in a country road, on the one hand, or a city street, on the other, which would make a trolley operated under the Act of 1893 an additional servitude in the one instance, and not in the other. I am not speaking of a road built and run in the manner pictured by the late chancellor in his opinion in the case of *West Jersey R. Co. v. Camden, G. & W. Ry. Co.*, 5 Am. Electl. Cas. 137, 52 N. J. Eq. 31-35, 29 Atl. 423. Nothing in the bill intimates that the cars or motive power or speed or tracks are to be different from other roads known under the name of "trolley railways." So it must be assumed that the road is to be used as an ordinary street railroad, the motive power of which is electricity. The features of such a road are that its tracks are laid so as not to interfere with the use of the surface of the road by other vehicles; that its cars are of such size, and run at such a speed, as not to interfere with other traffic; that such stops are made as will accommodate those

living along the line of the road. So used, I do not perceive the least difference in the adaptability of such a road to the uses of a highway, whether it be a country road or a municipal street. Its design is to serve the primary purposes of a highway, namely, to enable people to pass from one place to another. If a distinction is to be drawn between the highways and streets, upon what line shall they be distinguished? If density of population along the highway is to be the criterion, how closely must the houses stand? Must they be within 50 feet, 50 yards, or 500 yards, to destroy the right of an abutting owner to damages? If the test is to be a corporate test, and all roads lying within townships to be within one class, and all roads within other municipalities within the other class, what is the substantial basis of difference? I can perceive none. Then, again, as pointed out by Vice Chancellor GRAY in his opinion when this case was before him upon a rule to show cause why an injunction should not issue, a rural community in a short time may become an urban community, and thus the abutter upon a highway, who now has a right to damages for the location in front of his premises of a street railway, the next year may be stripped of that right by the fact that neighbors have built in his vicinage, or because the lines of a borough have been extended so as to include his property. In the case of *Zehren v. Light Co.*, 7 Am. Electl. Cas. 345, 99 Wis. 83, 74 N. W. 538, 41 L. R. A. 575, it was held that an electric road in a highway was different in its purpose and effect, from an electric road in a street. The force of the opinion, however, was spent in considering the right to change the grade of the highway, for the sole purpose of the electric road, so as to seriously impair the right of access of abutting owners. It was held that the power of a municipality to change road grades will be controlled by the courts, where it appears that the change is not for municipal purposes, but exclusively for the benefit of a private corporation. It was also held that the electric road was an additional servitude, but the distinction between highways and streets is not elaborated. The

court was content with the authority of the case of *Pennsylvania R. Co. v. Montgomery Co. Pass. Ry. Co.*, 5 Am. Electl. Cas. 166, 167 Pa. St. 62, 31 Atl. 468, 27 L. R. A. 766. It was held in that case that the construction of a street passenger railway upon the surface of a highway within a township imposed an additional servitude. In the opinion in that case, the difference in the easement of the public in a city street and in a country highway was illustrated by Pennsylvania cases, in one of which it was held that a pipe line could not be laid in a highway, and in the other that it could be laid in a street, without imposing an additional servitude. The illustrative use, it is perceived, belongs to the second class of servitudes already mentioned. The purpose of a street railroad, on the other hand, is to subserve the primary purpose of a highway. The case mainly deals with the inability of the township authorities, under their legal organization, to give consent to an electric railroad to carry passengers over a highway, through a township, on a journey from one city or borough to another, because it is in no sense a township purpose. But, as I must assume that the structure to be constructed on this highway is to serve the public within the township in exactly the same manner as within a municipal corporation, I cannot perceive why the road does not serve the people of a township in the same way as the people of a city. I am of the opinion that the bill states no ground for relief.

NOTE.—See note 2 at end of Part II.

FANNIE B. MILLER V. DETROIT, YPSILANTI & ANN ARBOR RAILWAY COMPANY.*Michigan Supreme Court, November 13, 1900.***ELECTRIC STREET RAILWAY MAY REMOVE SHADE TREES.**

An electric street railway, authorized by the proper township authorities to lay tracks, erect poles and string wires, is impliedly authorized to remove obstructions, including shade trees, whenever necessary for the construction of the railway as located by the township authorities, without compensation to the owner. The owner is, however, first entitled to notice and an opportunity to remove the trees himself.

Cases of this series cited in opinion: *Wyant v. Cent. Teleph. Co.*, vol. 7, p. 256; *So. Bell Teleph. & Tel. Co. v. Francis*, vol. 6, p. 160.

Appeal by defendant from judgment of Circuit Court, Washtenaw County.

Plaintiff recovered a judgment in the court below of \$275 for the destruction of eleven shade trees in front of her property, dug up and removed by the defendant in the construction of its railway. Plaintiff's land is situated in the township of Ypsilanti. The proper township authorities granted a franchise to the defendant's assignors for the construction of the railway, and fixed its location 20 feet from the center of the highway. This location of the roadbed evidently made it necessary to remove the trees.

Cutcheon & Stellwagen (John D. MacKay, of counsel), for appellant.

Tracy L. Towner (John P. Kirk, of counsel), for appellee.

GRANT, J. (after stating the facts): The principal and important question in the case is, has a street railway company the right to remove shade trees within the limits of the public high-

way, for the construction of its road as established by the township authorities without compensation for damages? The same principle was involved in *Wyant v. Telephone Co.*, 7 Am. Electl. Cas. 256 (Mich.), 81 N. W. 928, 47 L. R. A. 497. We there distinctly held that a telephone company had the right to cut out the branches of the trees along the public highway under a franchise similar to that here conveyed. The same necessity may exist for the removal of trees as may exist for the removal of their branches. The principle is the same in either case. It is established beyond controversy that municipal authorities have the entire control over their highways, streets, and sidewalks, and may remove shade trees whenever they are an obstruction to the use of the highway for public travel, without compensation to the owner. *Vanderhurst v. Tholcke*, 113 Cal. 147, 45 Pac. 266; *Everett v. City of Council Bluffs*, 46 Iowa, 66; *Wilson v. Simmons*, 89 Me. 242, 36 Atl. 380. It is true that these trees were lawfully planted, and that they are the private property of the abutting owner. It is also true that one planting trees in the public highway plants them with the understanding that they can remain there only so long as the space occupied by them is not required for public use. These roads are not an additional servitude, as we have repeatedly held. When, therefore, their construction is duly authorized, it logically follows that the company has the right to remove from the highway any obstruction which interferes with the proper construction and operation of the road. Such power is necessarily implied. *Dodd v. Traction Co.*, 57 N. J. Law, 482, 31 Atl. 980; *Telephone Co. v. Francis*, 6 Am. Electl. Cas. 160, 109 Ala. 224, 19 South. 1, 31 L. R. A. 193. When a man dedicates his land for a public highway, or it has been condemned for that purpose, and he has been compensated, it is definitely understood by him that whatever he may lawfully do within the boundaries of that highway is done with the right of the lawful authorities to appropriate the entire width of the highway for purposes of travel, if it shall become necessary. Street railways, in city and coun-

ry, have come to be regarded as a public necessity, and their construction upon the highways universally sanctioned. If the township authorities may remove any obstruction to the public use, there seems to be no sound reason why they may not authorize street railway companies, telephone companies, and the like to do so, when such companies are lawfully entitled to the use of the streets. It is conceded that the township authorities in this case were authorized to grant the franchise to the defendant, and to determine in what part of the highway its road should be constructed. The township authorities might possibly fix as a condition to the grant, the payment of damages for the destruction of shade trees. The legislature undoubtedly has the power to provide that abutting owners should be compensated for the damage that must result to them in the destruction of their trees. That, however, is a matter for the determination of the legislature, and not for the courts. The legislature has granted the power to do it without compensation. The township authorities have not provided for it. Courts are therefore powerless. But there is one fatal defect in the defendant's proceedings. It secured no greater rights by its franchise than the municipality had. The law gives neither the right to remove shade trees without notice to the owner, and an opportunity given to him to remove them as he may see fit. *Clark v. Dasso*, 34 Mich. 86. Under that decision plaintiff was entitled to recover for damages, and the judgment must, therefore, be affirmed. See, also, *Stretch v. Village of Cassopolis* (handed down herewith) 84 N. W. 51.

Judgment affirmed.

MONTGOMERY, C. J., and MOORE and LONG, JJ., concurred. HOOKER, J., wrote dissenting opinion.

**CONSOLIDATED TRACTION COMPANY V. SOUTH ORANGE AND
MAPLEWOOD TRACTION COMPANY.***New Jersey Court of Chancery, March 1, 1898.***INTERFERENCE OF ELECTRICAL USES.**

A trolley railway company, occupying a public street, is not entitled to compensation for the crossing of its tracks by another similar company, although such crossing necessitate the change of both tracks and wires, and the joint use of appliances to some extent; so long as the first company will not be permanently interfered with by the proper construction of the crossing.

Held, proper to determine the question on application for preliminary injunction.

Cases of this series cited in opinion: *Morris & Essex R. Co. v. Newark Pass. Ry. Co.*, vol. 5, p. 229; *West Jersey R. Co. v. Camden, &c., Ry. Co.*, vol. 5, p. 137; *Hinokman v. Union Depot R. Co.*, vol. 4, p. 463; *Halsey v. Rap. Trans. St. Ry. Co.*, vol. 3, p. 283; *New York, &c., R. Co. v. Bridgeport Traction Co.*, vol. 5, p. 246.

Application for injunction.

Mr. Coult and Halsey M. Barrett, for complainant.

Alfred Skinner and Mr. Ten Eyck, for defendant.

EMERY, V. C.: The complainant is a traction company operating street railways, organized under the Traction Act of March 14, 1893, and under this act entered upon and is operating the street railroad of the Orange & Newark Horse Car Railroad Company, as one of its lines. This street railroad is a double track road, running through Main street, in the city of Orange, and, at the time of the entry on it by complainant, was operated by horses, but is now equipped and operated by the electric overhead trolley system. The rights of the complainant to the occupation of the portion of Main street now in question, for the purposes of its railroad, were first conferred on the Newark Passenger Company, a predecessor in title of the com-

plainant, by a resolution of the common council of the city of Orange, passed August 25, 1890, which authorized this company to construct, maintain, and operate their street railway for the transportation of passengers from the point on Main street where their line then ended, westerly to the city boundary line. A previous resolution of the common council of August 8, 1890, gave the Newark Passenger Company the right to use the overhead trolley system for propelling their cars. The defendant is also a traction company, organized under the Traction Act of 1893, incorporated November 8, 1897, and on or about this date entered upon the street railroad of the South Orange & Maplewood Street Railway Company. This latter company was organized as a street railway company in 1894, and, by its original articles, its road was to be constructed entirely within the limits of the village of South Orange, and was to run over private property, except where it crossed two public avenues. The road was subsequently extended beyond the village of South Orange, and into the township of West Orange, and into the city of Orange, up to the south side of Main street, where complainant's railway is now operated. This extension is alleged by complainant to have been made without authority of law. The extension of the road of the South Orange & Maplewood Street Railway is also built upon private lands, except where it crosses the public highways; and, for this crossing of the highways by the road as extended, the municipal authorities of the township have given authority. The extension of the road by the street railway company, as far as the south side of Main street in Orange (according to the bill), was completed, and the road in operation, as long ago as the 7th of June, 1897; and on this date the street railway company applied to the city of Orange for permission to cross Main street, and the city council passed an ordinance on August 9, 1897, granting this authority. On August 30, 1897, a *certiorari* was granted by Mr. Justice DEPUE on the application of complainant, removing the ordinance to the Supreme Court; and by consent of the street railway com-

pany, which was a party defendant to the proceedings, the ordinance was afterwards set aside. One of the reasons assigned in the *certiorari* proceedings for setting aside the ordinance was that the street railway company had no authority to construct or operate a street railway beyond the limits of South Orange. After this ordinance had been set aside, the defendant, the South Orange & Maplewood Traction Company, was organized under the Traction Act of 1893, and entered upon the railroad of the South Orange & Maplewood Street Railway Company, as constructed and operated by the latter company. At the time of filing the certificate of entry required by the Traction Act of 1893 (P. L. p. 306, secs. 5, 6), the road was constructed and in operation as far as the south side of Main street, and ever since its entry thereon has been operated by the defendant from that point. On Nov. 8, 1897, the defendant, under the Traction Act (sec. 6), filed a route for a proposed extension of its road from the terminus of the extension of the road, on the south side of Main street, and across Main street, where complainant's tracks are laid. The Traction Act (sec. 6), requires the consent of the municipal authorities to the location of the route of an extension by a traction company before the construction thereof; and the defendant, on its application to the common council, procured an ordinance approved on December 21, 1897, granting permission to construct, maintain, and operate a double-track street railway across Main street. This ordinance did not provide for the location of the tracks and poles of the extension across Main street, but a resolution passed January 3, 1898 (three days before the filing of the bill), provides for these locations. The defendant's railway is also operated by the overhead trolley system, and it now proposes to construct its system across the complainant's tracks, and claims the right to do so under this ordinance. Such construction cannot be made without to some extent interfering with the complainant's tracks during construction, and the continued operation of both roads at the point of crossing in the method provided by the ordinance

will require the removal of the present rails of complainant, and the substitution, at the crossing, of rails especially constructed for crossings, and will also require the adoption of the overhead wire system now owned and used by complainant in such way that, at the place of crossing, a joint use for a short distance either of some portion of complainant's wire or of defendant's wire is necessary.

The complainant has given no consent to the construction of the crossing by defendant, nor has any offer of compensation for damages to complainant by reason of the construction been made. Complainant's bill asks an injunction upon two grounds: First, that the defendant has no right to make its extension across the street, for the reason that the railroad of the street railroad company, upon whose road defendant entered, was not lawfully constructed beyond the limits of South Orange, and defendant's entry thereon under the traction law, outside of that township, was unauthorized; secondly, that complainant's rights in its track and trolley system, operated in the public streets, are property rights, which cannot be interfered with against its consent, without compensation. A preliminary injunction is now applied for.

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Second. The principal ground upon which the right to a preliminary injunction is based is that the construction of defendant's railroad across complainant's tracks, and its operation by the trolley system, will necessarily invade complainant's property rights, as owner of the track and trolley system, and interfere with its franchise of operating its road. The construction of the crossing as proposed will undoubtedly interfere to some extent with the operation of complainant's road during the construction. And if constructed in the manner disclosed by the affidavits, and by the plans produced at the hearing, it will also permanently change the present actual condition of complainant's property at the crossing in the following particulars: In lieu of its continuous unbroken rail, a rail of special

construction, a cross in shape, called a "frog," is laid down, the arms of which are laid on the lines of the respective roads, and in such manner that, when laid, the line upon each road is continuous, except that, at the angle or very point of crossing, a groove or opening exists, sufficiently wide to admit the passage of the wheels of the cars which are to cross on the other line. This is the method now adopted as the best form of crossing for cars operated by trolley, and is the form of crossing adopted by steam and trolley cars in crossing, instead of leaving the line of the old road continuous, and breaking the rails of the new road. In the old form of crossing steam railroads by horse cars, there was no break in the railroad track; but the horse car wheels were pulled against and over the railroad tracks. When the tracks are actually constructed in the manner now proposed, there will be no interference with the operation of complainant's road; so that, so far as the tracks are concerned, the question of property rights is whether such change of the rail at the point of crossing can be made without consent or compensation. The operation of the trolley wires at the point of crossing will require a change in the complainant's system of more permanency; for when these are constructed in the manner now considered the best, and according to the plan proposed by defendant, there must be, at the place of crossing, a use for a short distance by one road of a trolley or feed wire supplied with electricity by the other road. The trolley feed wires of the two crossing systems are laid in the same plane; and inasmuch as the electric current operating each line must be continuous, so far as possible, and in the direction of the line, the trolley or feed wire of one of the companies is cut at the proposed crossing in such manner as to interrupt it for the whole width of the crossing of both tracks (about 30 feet); and for this space the current is carried between the points of the cut wire by a loop wire extending upward, and running over the crossing. The wire of the other company is not cut, but its current is continued as before. This leaves a

space of about 30 feet at the crossing, where the trolley wheel of the other company receives no current from its own wire or system, but must be taken from one end of its own wire (and of the loop), to the other end, without its own current; and, inasmuch as this loss of current for so great a distance would be unsafe, it has been provided against by the method of welding to the continuous wire of the company, whose line is uncut, a cross wire extending to the ends of the other company's cut or loop wire, but not connected electrically with these ends; this connection being prevented by the insertion of what is called a "circuit breaker." This cross wire, 30 feet in length, is supplied with a current from the wire of the continuous system. The general result, therefore, is that this cross wire between the points of the disconnected line is supplied with a current by one company, for the sole use of the other company, and in order that it may now have a practically continuous current over the actual crossing, which is the point of danger. Devices by switches, etc., for supplying electric currents to the cross wire from either system, may also be applied, but are not important or considered for the present purpose, for the reason that the defendant is undoubtedly bound to construct its crossing with as little interference with complainant's structures as is reasonably practicable; and this principle would give complainant the right or option to have its own continuous wire left intact. This could, on the proposed method, be accomplished, however, only at the burden of expense of providing on the cross wire the electric current for the company whose wires are cut; and, in disposing of the case, I will therefore consider the right to compensation on this basis of alteration. Another method of crossing is practicable, and is sometimes used, by which the wires of both companies are cut for a space of about nine inches at the crossing of each set of tracks (in this instance making four crossings), and a concave circular plate of this diameter or other device is inserted, which holds all the wires, and over which the two currents are also passed by loops of wire joining

the disconnected ends, and thus supplying a continuous current. But in this method the trolley wheel of each car "jumps" the nine-inch space covered by the plate without a current; and, inasmuch as four of these would occur at the crossing, the method above referred to, of supplying a continuous current, is now considered the best and safest, and is the one proposed to be adopted by defendant. The defendant, in its answer, admits its liability to construct the crossing at its own expense, and offers to supply the current for the cross wire to be used by complainant if its wire is cut. In the affidavits, the president of the defendant states that the defendant is prepared to bear all the cost attendant upon or incident to said crossing, either in its construction or subsequent maintenance.

It is manifest, therefore, that the construction of the crossing, as proposed, will to some extent change the nature and character of the complainant's ownership of its tracks and wires laid and erected by it in a public street, and will create hereafter, at the place of crossing, joint rights or interests of some character in the use of the tracks and wire system at this place. The question is whether this can be done against complainant's consent, without compensation. So far as relates to the mere interruption of the operation of complainant's road during the period of construction, there can be no basis for compensation, for complainant's right to the use of the street must be subject to the right of the public to cross its tracks located therein, and to the right of the public authorities to provide for crossing the tracks by any carriages or vehicles which have the right to use the street for travel, and to interrupt complainant's operation in such reasonable manner as may be necessary to provide for the construction of the crossing, when the right to cross exists. *National Docks & N. J. J. C. Ry. Co. v. Pennsylvania R. Co.*, 54 N. J. Eq. 142, 33 Atl. 860, affirmed March Term, 1896.

As to the permanent changes in complainant's tracks and wires, the precise question now involved has not been expressly adjudicated in our courts, nor has the right of the complainant

for such taking or use of its property as is purely and necessarily incidental to the crossing of its tracks by street cars, moved either by horse or electric power, in the safest and most approved method, been expressly recognized. And, on the other hand, the decisions of our courts thus far have recognized the rights of street railway companies to cross the tracks of steam railroads laid in the public street, without the consent of the latter, and without compensation. In *Morris & E. R. Co. v. Newark Pass. Ry. Co.* (1892), 5 Am. Electl. Cas. 229, 51 N. J. Eq. 379, 29 Atl. 184, Chancellor McGILL refused to enjoin a trolley company from crossing a steam railroad laid where the latter crossed a public highway, and from erecting its poles and wires over the complainant's road. The decision was affirmed by the Court of Errors and Appeals for the reasons given by the chancellor. *Id.* (1894) 52 N. J. Eq. 340, 31 Atl. 383. In *West Jersey R. Co. v. Camden, G. & W. Ry. Co.* (1893), 5 Am. Electl. Cas. 137, 52 N. J. Eq. 31, 29 Atl. 423, Chancellor McGILL likewise refused to enjoin a trolley company from crossing the tracks of a steam railroad company laid in a public street. In both of these cases, the decisions, so far as they were made on the merits of the case, involved the denial of any right to compensation to the railroad company, unless it be considered that, being applications for preliminary injunctions, the denials of such injunctions were correct, because the right to compensation was doubtful, and therefore could not be protected by preliminary injunction. From the report of the *Morris & E. R. Co.* case on appeal, in 29 Atl. 184, and 31 Atl. 383, it would seem that this was the ground relied on; but in the official report (52 N. J. Eq. 340, 31 Atl. 383), all the reasons given in the court below are approved. This principle of refusing preliminary injunction, if the complainant's right be doubtful, if now applied, would require, I think, the denial of the preliminary injunction in the present case.

The recent decision of the Supreme Court in a late case (*Paterson, N. & N. Y. R. Co. v. City of Newark* [N. J. Sup.,

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Nov., 1897] 38 Atl. 689), is relied on by complainant's counsel as settling the legal right to compensation in this case, but I do not so read the decision. In that case a public street was laid out over a railroad operated at this point on the company's own land, for which land, and damages for the use of it as a street, the railroad company was, under the law relating to the opening of streets, entitled to compensation. The question was whether the expenses of a flagman and of gates at the new crossing were proper elements of damages for the opening of the street, and it was held that they were. The right to any compensation whatever in the case was based on the taking of land belonging absolutely to the company, as a private owner, and for which it had paid; and the company being therefore entitled, by the express provisions of the statute, to damages for the taking of its land, the question was as to the elements properly included. This case is no authority for the present application of complainant, which depends upon its rights to compensation for tracks and other structures erected, not on its own lands, but in a public street. The Coach Co. case (1880), 33 N. J. Eq. 267, is also relied on as establishing the nature of the complainant's ownership of its tracks and wires, and inferentially the right to compensation for any interference whatever therewith. But that case related to the habitual wrongful use of the railway company's tracks for the purpose of passage along the same, and did not touch upon or settle the question of necessary interference for the purpose of legitimate public travel across the track. Nor was the Coach Company case considered in the later decisions above referred to as settling the rights at crossings. In these decisions (Morris & E. R. Co. and West Jersey, G. & W. R. Co. cases), the respective right of the electric street car and steam railroad companies at crossings in the public streets were fully treated on the merits of the question; and principles were laid down which, as it seems to me, when read in connection with our previous decisions, govern the question of the right of complainant to compensation for crossing its tracks laid in a

public street. And in view of the fact that the right to compensation, if it exists in this case, is a constitutional right to compensation previous to taking, which can be fully protected and enforced only by the prevention of the taking of complainant's property, I am inclined to think that where the complainant is in actual possession and constant use of the property proposed to be taken or interfered with by the defendant, under claim of statutory authority, and all the facts relating to the existence of the right of the defendant to thus take or interfere with the property in complainant's actual possession and use are fully presented on application for preliminary injunction, leaving no substantial dispute as to the facts which should be settled by a final hearing, and no other special reason appears in the case for delaying the decision of the legal question arising on the facts until final hearing, then this court should decide the legal question of the right to compensation on application for preliminary injunction. Such cases would seem to come within the class referred to in *Hart v. Leonard* (Err. & App.; 1886), 42 N. J. Eq. 415, 419, 7 Atl. 865, as cases where one attempts to appropriate the land of another, under color of statutory authority, without complying with the legal conditions precedent. In the cases there cited as belonging to this class, the right to compensation was affirmed and protected by preliminary injunction. See, also, *Township of Franklin v. Nutley Water Co.*, 53 N. J. Eq. 601, 32 Atl. 381, and cases cited on page 606, 54 N. J. Eq., and page 383, 32 Atl., as to the use of preliminary injunctions for the protection of constitutional or statutory rights requiring previous consent of complainants previous to interference with their property or right of control. These cases as to the decision upon preliminary injunction differ from the cases where the complainant is not in the actual possession and use of the property proposed to be taken, and where complainant's own right to the legal possession, free of defendant's right to take without compensation, was the doubtful right asserted. Such cases of doubtful right in complainant not in

actual possession were *Hinchman v. Railroad Co.* (Chancellor GREEN, 1864), 4 Am. Electl. Cas. 463, 17 N. J. Eq. 75, and *Halsey v. Railway Co.* (Vice Chancellor VAN FLEET, 1890), 3 Am. Electl. Cas. 283, 47 N. J. Eq. 380, 20 Atl. 859. And, although in both of these cases protection of complainant's doubtful right by preliminary injunction was denied, yet it should be noticed that complainant's right to compensation was in both cases fully examined, on its merits, and decided adversely to complainants, and both cases have been since accepted as settling the important questions of right involved, viz.: that additional burdens in the public easement on streets are not created by the use of street cars operated by horse power or trolley.

In the present case all the facts relating to the manner of crossing, upon which the right to compensation must depend, are as fully presented as they would be on final hearing. The property of complainant in constant use by it is proposed to be actually interfered with, and there would seem to be no sufficient reason why the question of the right to compensation should not be now considered, and that right be protected, if it be held to exist. Considering the question, therefore, upon its merits, I shall apply the principles relating to it, which seem to me to be settled by our decisions above referred to, especially in the *Hinchman* case, the *Halsey* case, the *Morris & E. R.* case, and the *West Jersey, G. & W. R. Co.* case, *supra*. These cases settle that electric street railways, operated by the overhead trolley system with its poles and wires, are not additional burdens upon the soil of the highway, and that these structures may be placed in the public streets without compensation to the owner of the soil, subject to the public easement of passage and other ordinary uses of a highway. They also settle that a steam railroad lawfully constructed across a public street cannot exclude the public from the right to use the highway at the point of crossing, or from crossing their tracks by street cars operated by either horses or trolley, except to the extent that interference

may be necessary to permit the lawful operation of the steam railroad at the point of crossing. These principles, as it seems to me, control the right of trolley companies (whose tracks are laid longitudinally in the public street) to prevent the crossing of their tracks. They can only prevent this crossing so far as the crossing interferes with or prevents the operation of their road or the exercise of their franchises. Their tracks occupy the streets longitudinally, without compensation to the abutting owner, only upon the theory that they provide a method of passage over the street which does not interfere with the ordinary use of the streets for public travel, and that their construction or operation in their ordinary mode does not exclude or prevent reasonable crossing of its tracks by the public. And the right of the legislature, or of a municipality, under its authority, to provide for crossing of tracks already laid down by other tracks operated in the same manner, seems to rest upon the same foundation as the original right of the complainant to construct its own tracks in the public streets, and operate by overhead trolley, without compensation. The right of one street railway to cross another street railway already constructed is the same legitimate use of the highway as the construction and operation of the original road; and the original right to construct and operate a road in the public streets is necessarily subject to all legitimate purposes of crossing. This would include the methods of crossing made necessary by the development of legitimate methods of using the streets for travel. Nor does the fact that the crossing, as at present proposed, necessitates some actual interference with the tracks and wires as constructed, and to some extent changes thereafter the exclusive use by complainant at the crossing, prevent the crossing by a similar railway company, without compensation, if made under the proper legislative authority; for these changes are the necessary result of the development of the method of operating electric roads at their points of crossing, and are such as are made necessary, as the best and safest methods now attainable for the safety and

convenience of the public in the operation of both roads at the point of crossing. They are therefore changes and burdens in the use of its tracks and trolley system to which the original right to lay and construct them was necessarily subject, and, in a legal point of view, are different only in degree, and not in character, from the changes in the property and control of its tracks made in the ordinary horse car crossing. By reason of the operation of both railroads by electricity supplied by overhead wires, the actual joint use at the point of crossing, which was, with the horse railways, confined to a short space on the tracks and surface of the ground, is now extended to a more complicated system of tracks on the surface, and also of wires overhead. But it is still in the whole extent of the crossing appliances, and in every part thereof, merely a crossing in the safest and best manner by two street railroad companies, each of which has the right to use electricity at the place of crossing, with the proper tracks and wire system for that purpose. The use of the whole system, although a complicated use, is still, in its essential nature, only a joint use of the public highway at the point of crossing for the sole purpose of crossing; and inasmuch as the complainant's tracks and wires were originally laid and constructed subject to the right of the proper authorities to disturb them for the purpose of legitimate public travel in the public street across their tracks, and the changes and disturbances are necessarily incident to such crossing, these are not in my judgment the subject of compensation. If the complainant is to be compensated for the changes in its property to which it is subjected, solely by the necessity of providing for legitimate public travel across its tracks, and can prevent such travel on the streets from crossing its tracks until compensation for the changes in its property and damages (whatever they may be) arising solely from the necessary provision for such travel, then a situation arises in which it may, perhaps, be necessary to consider whether the structures which complainant has erected in the street have not now become such as interfere with and ob-

struct public travel at the point of crossing, and for such exclusive benefit of the complainant that they go beyond its right of occupation of the street, and whether the company, on its part, has not become subject to claims for compensation based on the imposition of an additional burden on highways at the point of crossing for its exclusive use. The only basis for the existence or continuance of complainant's structures in the street, without compensation, is that they do not substantially interfere with the ordinary and proper use of the highway for public travel; and, so long as the structures it erects are kept within its limit, no right to compensation would arise; but, if the structures it now erects do interfere with legitimate public travel across its tracks, by methods of travel which are legitimate on the other portion of the public street, then, as it seems to me, the complainant has erected and is operating a system which is no longer a mere instrument for public travel over the highway subject to the right of the public to cross it in any legitimate manner, but has by its structures interfered with and obstructed a certain portion of the legitimate travel across its tracks. And if these structures of complainant cannot be safely or reasonably crossed by such legitimate travel, without compensation, then the operation of them goes beyond the original limitation of complainant's right to occupy the streets for travel in common with the public; and, as to the legitimate travel in crossing, complainant's structures are not entitled to be protected by injunction for the purpose of securing compensation.

I reach the conclusion, therefore, on the merits of the question, that the complainant is not entitled to compensation for damages to its property by the proper construction of this crossing; and as the crossing, when properly erected, will not interfere with the exercise of its franchises, the application for preliminary injunction on this ground of right to compensation is refused. This conclusion agrees with the principles settled by the decisions of the courts of other States, in cases involving the rights of crossing in public streets, so far as I have been re-

ferred to them. These are cases of street car tracks crossing steam railroads, and deny this right to compensation. *Brooklyn Cent. & S. R. Co. v. Brooklyn City R. Co.* (1861), 33 Barb. 420; *Chicago, B. & C. R. Co. v. West Chicago St. R. Co.* (Ill. Sup.; 1895), 40 N. E. 1009; *Philadelphia, W. & B. R. Co. v. Wilmington City Ry. Co.* (Del. Ch.; 1897), 38 Atl. 1067; *Pennsylvania R. Co. v. Greensburg, J. & P. St. Ry. Co.* (Pa. Sup.; 1896), 35 Atl. 122; *New York, N. H. & H. R. Co. v. Bridgeport Traction Co.* (Conn., 1895), 5 Am. Electl. Cas. 246, 32 Atl. 953.

It was suggested in the brief of complainant's counsel that a court of equity has jurisdiction to control the construction of this crossing if the parties cannot agree. Such jurisdiction can, undoubtedly, be exercised; and, where the right to construct a crossing exists, a court of equity will, if necessary, and on application of either party, interfere to control the construction. This was the course taken in this court where the right to construct a crossing arose after condemnation proceedings, and the jurisdiction for the purpose of finally deciding upon the character of the crossing was affirmed by the Court of Errors and Appeals. *National Docks & N. J. J. C. Ry. Co. v. Pennsylvania R. Co.* (Vice Chancellor REED, 1896), 54 N. J. Eq. 142, 33 Atl. 860, affirmed March Term, 1896. And such equitable jurisdiction relating to the joint use of the public highway would probably extend to the settlement of all questions relating to the construction, operation, and maintenance of the crossing in case the parties did not agree. But the bill in the present case is not based on the right to equitable interference for the purpose of constructing the crossing properly, either as to time or manner, but to prevent its construction at all, in any manner, without compensation. Nor has the argument on this application been addressed to the question of controlling the joint use, and I am not satisfied that an interference by this court is yet necessary for this purpose. The defendant, of course, has no right arbitrarily to select its own time or manner of erecting the

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crossing, but, as it now strikes me, is bound, if no agreement is made, to give due notice, both of the time and manner in which the crossing is proposed to be made. This was the course pursued in the National Docks case. The rights and obligations arising upon the notice are matters which are not now before the court. The present application is denied.

NOTE.—See note 2 at end of Part II.

BIRMINGHAM TRACTION COMPANY V. SOUTHERN BELL TELEPHONE & TELEGRAPH COMPANY.

Alabama Supreme Court, Oct. 29, 1898.

INTERFERENCE OF ELECTRICAL USES.

While prior occupancy of a street by a telephone company may not confer privileges superior to that of an electric railway company subsequently entering the street, it may certainly be considered in denial of the railway company's rights to usurp the street and exclude the telephone company.

While incidental damages will not warrant the enjoining, at suit of a telephone company, of an electric railway company from operating its road, injunction is warranted by such actual present injury by the railway company, as so placing its wires as to short circuit and ground the wires of the telephone company and prevent their use.

Case of this series cited in opinion, *Cumberland Teleph. & Tel. Co. v. United Elec. Ry. Co.*, vol. 4, p. 296.

Appeal by defendant below from decree overruling demurrer and denying motion to dismiss bill and dissolve injunction.

Appeal from Chancery Court, Jefferson County.

The facts alleged in the bill, so far as is necessary to set them out for a proper understanding of the case, are, that the appellee, complainant below, is a duly organized and incorporated company, with full authority, under its charter, to own, build,

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and construct lines of wire and poles for telephonic and telegraphic purposes, and that it now owns and is operating, and has, for a long time,—for ten years or more,—owned and operated with full power and authority to do so, in and around the city of Birmingham, Ala., along streets and avenues in said city which are specifically named, a system of telephone service, which required poles and wires for its operation.

It also avers, that the defendant, the Birmingham Traction Company, the appellant in this court, a corporation organized under the laws of Alabama, is operating a street railroad along the streets and avenues along which the complainant is operating its telephone lines, which street railroad is run by steam power; that it has been informed, and upon information and belief states, that the defendant proposes to convert its street railroad into a road on which its cars will be propelled and operated by electric, instead of by steam power, by which the same is now being operated; that defendant will be compelled, in the operation of a street railroad propelled by electric power, to erect and construct poles and wires all along said streets and avenues, along which complainant's telephone lines are being operated, and that defendant has a large force of men engaged in erecting such poles, wires, etc.; that the poles upon which defendant proposes to stretch its wires, are placed in such a manner as that the stringing and stretching of the wires upon said poles, will greatly injure and damage complainant in the exercise and enjoyment of its franchise; that the complainant has already been injured and damaged by defendant's wires, which have been constructed on parts of said streets and avenues, and that the stretching of said wires along said streets and avenues upon the poles of defendant, as they are now placed, will irreparably injure and damage complainant by crossing and short-circuiting or grounding complainant's wires, so that it cannot carry on its business; that such short circuits or grounded wires will greatly interfere with and damage its telephone subscribers whose connections are on such streets and avenues.

It is further alleged, that defendant is putting up its said poles and wires in a manner contrary to law and public policy, to complainants' great damage as aforesaid, in this, that defendant is placing its wires at such height that they sometimes are over and sometimes are under complainant's wires, and in passing or crossing complainant's wires, they touch and rub up against them and thereby interrupt and cut off the electric current, so that messages cannot be sent over complainant's wires; that complainant called on the general manager of defendant, and called his attention to the fact that defendant's said poles and wires were so constructed, that they short-circuited and grounded complainant's telephone wires, so that it cannot carry on its business, and requested him to correct the wrong; and said manager, in very coarse and emphatic language, said that defendant would not correct it, and if complainant did not do it itself, defendant would tear up complainant's wires and poles.

Complainant further alleges that it is the duty of the last party putting up electric wires along, by or across other electric wires, to so place its wires as not to injure the said wires which are already up; that there is an ordinance of the city of Birmingham, which the defendant has been and is now violating to complainant's irreparable injury, which is as follows: "Whenever it is necessary for any electric light, power or trolley wires to be run under telegraph, fire alarm or telephone wire, permission shall be granted to do so, but the company running such wire or wires shall pay the expense of raising the other wires, if already unlawfully constructed, so that said wires shall not be less than five feet above said electric light, power or trolley wire, to make them entirely safe; and whenever any telegraph, fire alarm or telephone company wishes to stretch wires above any electric light, power or trolley wire, they must cross not less than five feet above said wires. The guard wire above each trolley wire must consist of two wires not less than No. 10 gauge, and be tightly strung not less than two feet above said trol-

ley wire, and twelve inches on each side; but when strung on poles, center street construction, one guard wire shall suffice. The cost of such guard irons or change of poles shall be borne by the person or company making the last construction."

It is also averred upon complainant's information and belief, that defendant has no power or authority under its charter to build, own, and operate street railroads in the city of Birmingham, propelled by electricity.

The prayer of the bill was that an injunction be issued "restraining and enjoining the defendant, its officers and agents, from so constructing its line of poles and wires on and along said streets and avenues as set out in the body of this bill of complaint, as to interfere with, hurt, harm or injure complainant's said telephone property, service wires and poles."

Upon the filing of the bill, there was issued a temporary injunction. The defendant moved to dismiss the bill for the want of equity, and also demurred to the bill upon the following grounds: (1) It is not shown in and by said bill how complainant will suffer any irreparable damage. (2) It is not shown in and by said bill that the damage which complainant will suffer by the erection of said poles and wires is other or more than the incidental damage arising from the operation in the same streets and avenues of two electric systems. (3) It appears from the allegations of said bill that complainant has a full, adequate and complete remedy at law for the redress of the grievances alleged. (4) It is not shown in and by said bill why complainant cannot raise its said wires and put in the necessary guard wires as required by the ordinance of the said city of Birmingham, set forth in said bill, and thus avoid the damage and inconvenience complained of. (5) It is not alleged in the said bill that this respondent is insolvent, or not fully able to respond in damages to any judgment complainant may recover against it, or has ever refused to pay for raising said wires. (6) It appears from the said bill that this respondent is building and equipping an electric street car system

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along the streets and avenues mentioned, without objection on the part of the municipal or other authorities, and complainant cannot question the authority of respondent to thus build and equip its said line in this proceeding. The defendant also moved to dissolve the injunction for the want of equity in the bill. On the submission of the cause on the motions and demurrers of the defendant, the chancellor rendered a decree overruling the motion of the defendant to dismiss the bill and the demurrer to the bill, and also overruled the motion of the defendant to dissolve the injunction. From this decree the defendant appeals, and assigns the rendition thereof as error.

Alex T. London and John London, for appellant.

Walker, Porter & Walker, for appellee.

HARALSON, J.: We do not understand it to be insisted in this case, that the telephone company has the exclusive right to the streets and avenues of the city of Birmingham for the purpose of operating its telephone system. No company, under ordinary circumstances, can assert and maintain a right to the exclusive enjoyment of a public street. Such a monopoly the law does not favor. Counsel for appellee in their written brief say that "it does not seek to enjoin appellant from constructing its electric street railway, but simply asks that appellant be restrained from so constructing its lines of poles and wires on and along said streets and avenues, as to interfere with, hurt, harm and injure appellee's property, service wires and poles." Nor, again, do we understand the contention of appellee to be that a telephone company can maintain a bill for an injunction against the operation of an electric railway, to prevent damages incidentally sustained by the escape of electricity from its rails and wires. It is probably true, that two electric systems of the kind could not be constructed in and operated along the same

street,—unless it was of uncommon width,—without inflicting some incidental injury or damage, the one to the other. In the present state of electrical science, one would not be authorized to be very definite or emphatic in his conclusions touching such matters. However that may be, it may be safely stated, as applicable to all conditions, that no one public corporation of the kind should be given a monopoly to the exclusion of others in the use of the streets of a city. Ordinarily, such privileges should be granted, equal with and not superior to other like enterprises established for the use of the public. The State licenses such enterprises, not simply that the owner of them may earn profits by establishing and operating them, but that the general public as well may enjoy the benefits of their existence; and when two are authorized by law to use the same street or avenue, it should be with the express or implied condition, that each shall respect the rights and interests of the other, and occasion no unnecessary harm the one to the other. The matter of the regulation of such public corporations is usually committed to the municipalities where they are established, and in the case before us, it is certainly true, that the regulation of the two corporations pertains to the municipal government of the city of Birmingham.

The matter of dispute between them, as disclosed by the bill, demurrers thereto and motion for its dismissal, and the argument of counsel here for appellee, seem to suggest some superior rights in the appellant company over the rights of the appellee company, in the use of the streets and avenues of the city of Birmingham, along which the appellee has been for so long a time operating its telephone system, by the authority, it is to be presumed, of said city. There is no suggestion in the bill, however, that this authority to the appellee is exclusive. The bill does allege an ordinance, set out in the statement of facts, which seems to have been adopted for the purpose of preventing just such contentions and difficulties as those presented in this case, which ordinance, it is alleged, the defendant has been and is now violating, to the injury of complainant. If this

is true, as it must be on the trial of this case, on the facts alone alleged in the bill,—and if it is also true, as alleged, that complainant, before filing this bill, went to see the general manager of defendant, and called his attention to the fact that his company was constructing its poles and wires in a way, as set out in the bill, to prevent complainant from carrying on its business, and that said manager in emphatic language replied that defendant would not correct the abuses complained of, and notified complainant that if it did not itself correct these troubles, defendant would tear up complainant's wires and poles,—there arises what appears to be an unwarranted usurpation of right and power by defendant, denying to complainant anything like an equal privilege to the enjoyment of said streets with the defendant. The complainant had for about ten years, been operating its telephone system, under full authority to do so, as is alleged, and was the first comer to occupy the streets. While such prior occupancy, we deem it unnecessary to decide conferred superior privileges, it may certainly be considered in denial of defendant's alleged usurpation of superior rights in said streets and avenues.

For the purposes of the case, if conceded that defendant, in operating its electric railroad, had a right to use the streets of said city, equal, in all respects, to the right of complainant to the enjoyment of the same for the purpose of its telephone system, which is as much as defendant may claim, the concession would place the two companies towards each other in the legal attitude of using, each in a sense, its own property, calling for the application of the old and just and universally accepted rule, that every person is bound to the exercise of reasonable care in the use of his own property, and for any default in that particular, he is liable to the person injured in an action of damages resulting from his own negligence, or to state the same rule somewhat differently, it is nowhere denied, that "if one do a lawful act upon his own premises, he cannot be held responsible for injurious consequences that may result from it, unless

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it was so done as to constitute actionable negligence;" and whatever annoyance or injury may result to one person from the rightful and lawful use of his property,—which implies a want of care for the rights and interests of others,—it is *damnum absque injuria*. In conformity with these principles, it has been stated by high authority, in a case similar to the one in hand, to be "well settled so far as persons operating under legislative grants are concerned, that something more than accidental damage to another must be proved,—something in fact in the nature of an abuse of the franchise,—to entitle the party injured to an injunction." *Cumberland Tel. & Tel. Co. v. United Electric Ry. Co.* (C. C. M. D. Tenn., opinion of BROWN, J.), 4 Am. Electl. Cas. 296, 42 Fed. 273. See, also, 25 A. & Eng. Enc. Law, 764-767.

The contention of appellant, that the court below erred in overruling the motion to dissolve the injunction, proceeds upon the assumption, that there is no equity in the bill, as appears from its own allegations. It may be admitted, that a mere allegation of irreparable injury without a statement of facts to show such injury, is a mere conclusion, and cannot be made the ground for granting an injunction. The facts in this case, to show such alleged injury, are fully set out. Whether they are fully enough averred or not, we will not now discuss. That they show injury to complainant of a serious character is manifest. The right in complainant to use the street, cannot, under the allegations, be denied. The conduct of defendant as shown, is an unwarranted usurpation, amounting to a trespass on complainant's rights, which is recurrent, continuous and tending to a multiplicity of suits. This, a court of equity will interfere by injunction to prevent. *Bowling v. Crook*, 104 Ala. 130, 131, South. 131.

Moreover, the authority of an equity court to grant and maintain this injunction, may be rested on that other ground of chancery jurisdiction, that such courts will interfere to control such corporations as these, to keep them within the line of the

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authority and subject to law, in order to prevent such usurpations and damages as are here complained of. *East & W. R. Co. v. East Tennessee, V. & G. R. Co.*, 75 Ala. 275; *Railroad Co. v. Matthews*, 99 Ala. 24, 10 South. 267; *Railway Co. v. Withrow*, 82 Ala. 190, 3 South. 23; *Mobile & M. Ry. Co. v. Alabama M. Ry. Co.* (Ala.), 23 South. 57.

The damages to complainant in this case as shown, are not accidental, growing out of a careful and lawful use of the streets and avenues by defendant, and such as are *damnum absque injuria*; but they arise from the misconduct of defendant in the nature of an abuse of its franchise. These damages the defendant might, as appears, avoid, but which it without reason claims the complainant was under obligation to remove.

If the facts of this case as averred are true, as the demurrer and motion to dismiss admit, it is difficult to see why the bill does not contain equity. There was no error in refusing to dissolve the injunction.

Affirmed.

NOTE.—See note 2 at end of Part II.

EDISON ELECTRIC LIGHT & POWER CO. v. MERCHANTS' & MANUFACTURERS' ELECTRIC LIGHT, HEAT & POWER CO. ET AL.

Pennsylvania Supreme Court, July 17, 1901.

INTERFERENCE OF ELECTRICAL USES.

If two electric light companies are granted similar franchises in the same street, the later, if either, must be limited in its use of the street, so as not to interfere with the line of the other company.

This is not affected by the fact that the later company has a contract for public street lighting.

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Not only wanton and negligent damage, but all interference, not strictly unavoidable, with the line of the earlier company, will be enjoined, irrespective of the question of additional expense.

Appeal from Erie County Court of Common Pleas.

Bill to enjoin interference.

Appeal by complainant below.

Frank Gunnison, for appellant.

John S. Rilling and *Henry E. Fish*, for appellees.

MITCHELL, J.: This decree must be reversed for want of any proper finding of facts upon which it can be sustained. The gravamen of the bill is that the complainant, being in the lawful exercise of its franchises with the consent of the city, is interfered with at present, and in danger of further interference in the future, by the defendant placing its wires so as to cross or run between, through, and among the plaintiff's wires, in dangerous proximity thereto, and through the space already occupied by plaintiff, and, secondly, through adjacent space necessary to the plaintiff for the growth and future operation of its business. The answers of defendants deny the danger of interference by proximity of the wires, and aver that complainant is occupying an unreasonable and unnecessary space, not in good faith, for the purposes of its business, but with dead wires, merely to obstruct and exclude any other company from the streets. The court unfortunately made no conclusive finding on these disputed points, though it did find, in a general way: (1) That the defendant had strung its wires "in many places in dangerous proximity to the wires of the plaintiff company, and in some places through and between the wires of the plaintiff company; that, subsequently to the filing of plaintiff's bill, a very large majority of such interferences were remedied by the defendants, but up to the time of taking the last testimony in this case, on the 14th day of April, 1898, the defendants had

not so adjusted their lines as to be entirely free from interferences with the plaintiff's line." (2) That, "after the city of Erie had entered into the contract with the defendant for the street lighting, the plaintiff company, in order to hold the said unoccupied space claimed by it, in many places strung numerous dead wires along its poles and over street intersections, in such a way as to embarrass the defendant in the construction of said extension of its line." (3) That the court was "not satisfied that the defendant, in the construction of its line as it now exists, after the correction of the interferences as above stated, has inflicted any wanton, negligent, or unnecessary injury to the electric lines and property of the plaintiff."

On these findings both parties appear to be somewhat in fault, and there is no accurate determination of their respective rights, the court being of opinion that this was unnecessary, for the reason set out in the legal conclusions, that, "as between said plaintiff, engaged, as at present, exclusively in commercial and private lighting, and the defendant, so far as it is engaged exclusively in lighting the public streets by virtue of a city contract, the defendant, although holding the later franchise, by virtue of the public character of its business, has the paramount right of way, so far as is necessary to reach the places where the contract calls for street lighting, by a direct and practical route; but at the same time the defendant, in the construction of its line for the purpose of such street lighting, has no right to do the property of plaintiff any wanton, negligent, or unnecessary damage, and must at all places keep its lines clear from those in actual use by plaintiff, wherever it can be done without extra cost." This principle is wholly inadmissible. How far the city, having agreed to the plaintiff's exercise of its franchises upon the street, may, under its municipal powers and duties, or under the reservations of its ordinance of consent, subsequently invade or interfere with the franchises, is not now before us. But, as between two corporations exercising similar franchises upon the same street, priority carries superiority of right.

Equity will adjust the conflicting interests as far as possible, and control both, so that each company may exercise its own franchises as fully as is compatible with the necessary exercise of the other's. But if interference and limitation of one or the other are unavoidable, the later must give way, and the fact that it is under contract with the city for work of a public nature does not alter its position, or give it any claim to preference.

Moreover, the standard of damages indicated by the court that the defendant, in the construction and operation of its line must not do "any wanton, negligent, or unnecessary damage," and must keep its lines clear from those of plaintiff, "wherever it can be done without extra cost," is altogether too broad. Equity will enjoin, not only wanton or negligent damage, but all interference which is not strictly unavoidable, and, in regard to keeping defendants' wires clear of those in *bona fide* use by the plaintiff and necessary for its business, the injunction must be absolute, without regard to extra cost of other methods.

The further question raised by appellant, of the right of plaintiff to exclude defendants from the occupation of space necessary for plaintiff's business in the proximate future, is not sufficiently presented, on the facts of the case, for determination at this time. The court has found that plaintiff has occupied unnecessary space with dead wires to exclude or embarrass defendant, but how far its requirements of space for future growth may be genuine, and how near in the future, is not shown. Decree reversed, with directions to rehear and determine the case on the principles of this opinion.

NOTE.—See note 2 after next case.

POSTAL TELEGRAPH CABLE COMPANY OF UTAH V. OREGON
SHORT LINE RAILROAD COMPANY.*Utah Supreme Court, May 10, 1901.*

TELEGRAPH LINE ON RAILROAD RIGHT OF WAY.—EMINENT DOMAIN.

and owned by a railroad company but not being part of its right of way or essential to the enjoyment of its franchise and property may be appropriated to the use of a telegraph company, as a more necessary public use.

A telegraph company which has availed itself of the provisions of the Post-roads Act of Congress may construct its line along the right of way of a railroad company, not materially interfering with its use for railroad purposes.

Acceptance by telegraph company of privileges of Post-roads Act may be shown by the certificate of the postmaster-general.

In a proceeding to condemn land for purposes of a telegraph company, along a railroad right of way, *held*, that possession cannot be taken until after compensation fixed, pursuant to State statute, and paid; that the measure of damages is the depreciation in value of right of way for railroad purposes, and in case of no interference the damages are nominal; that damages from added expenses of burning grass along the right of way, due to presence of telegraph poles, is too remote to be considered; that the property required was sufficiently described.

Cases of this series cited in opinion: *Postal Tel. Cable Co. v. Morgan's La., &c., Co.*, vol. 6, p. 183; *Lockie v. Mut. Un. Tel. Co.*, vol. 1, p. 425.

Appeal by defendant below from judgment of District Court, Salt Lake County.

P. L. Williams, for appellant.

Powers, Straup & Lippman, for respondent.

HALL, District Judge: In this case it appears that on the 14th day of July, 1899, certain citizens of Utah, in connection with the assistant superintendent and the general counsel of the Postal Telegraph Cable Company, a corporation organized under the laws of New York, proceeded to organize under the laws

of Utah the respondent herein, the Postal Telegraph Cable Company of Utah. Ten per cent. of the capital stock of the Utah corporation was paid in, the money being furnished by the New York corporation. All the requirements of the statutes of Utah relating to the organization of corporations were complied with. The articles of incorporation were duly filed with the county clerk of Salt Lake county, and a certified copy of the same was filed with the secretary of State of Utah, who issued his certificate, as required by law, certifying that the respondent had complied with the provisions of the statutes and that it was duly incorporated. The directors of the respondent met and formally organized, directed that negotiations be had with appellant for a right of way to construct a telegraph line along its railroad right of way from Salt Lake City north to the Idaho State line, and adopted a resolution selecting the right of way and also proceeded to accept the provisions of an Act of Congress, approved July 24, 1866, entitled "An act to aid in the construction of telegraph lines and to secure to the government the use of the same for postal and military and other purposes. Failing in its negotiations, respondent commenced this proceeding under the Eminent Domain Act of Utah to condemn a right of way for the purpose of constructing, maintaining, and operating its telegraph line upon the right of way of the appellant longitudinally, from Salt Lake City north, through the counties of Salt Lake, Davis, Weber, Box Elder, and Cache, in this State, to the State line of Utah and Idaho,—a total distance of about 100 miles. In its complaint the respondents set forth the character of the construction of the telegraph line designed, the length of the poles, their size at the base, the depth that they would be planted in the ground, their distance from the railroad track, and the size of the cross-arms upon which wires are proposed to be strung. It was also alleged in the complaint that when crossing the track of appellant, the wires would be strung high enough for safety, and that on reasonable notice from appellant, when it was necessary, the poles would be moved to such

a point as the appellant might designate. The distance of the poles from each other and the amount of ground each would occupy was alleged; the general route and terminal were described; the necessity for the taking, and the failure of the parties to come to terms were set forth; and the fact that the telegraph line would not interfere with the appellant's business was stated, as well as other allegations not necessary here to repeat. The defendant demurred to the complaint upon two grounds: (1) That the court has no jurisdiction of the subject-matter of the action, so far as the same is situated outside of Salt Lake county and within the counties of Davis, Weber, Box Elder, and Cache, respectively; (2) that the complaint does not state facts sufficient to constitute a cause of action. After argument the demurrer was overruled by the lower court, and the appellant answered, denying the incorporation of respondent, and basing its defense principally upon an allegation that the respondent is the agent and under the control of the Postal Telegraph Cable Company of New York, a foreign corporation, which has not the power to exercise the right of eminent domain in this State, and which, through the organization of respondent, is seeking to do by indirection that which it cannot accomplish in its own name directly, and that in reality respondent has no separate existence from the Postal Telegraph Cable Company of New York. The case was tried in the District Court without a jury, and the court found the issues for the respondent, assessing appellant's damages at \$100.

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It is objected that the complaint does not so describe the lands or premises which respondent asks to have appropriated to its use that it can be definitely described in a judgment. The complaint asks for a right of way upon the railroad right of way between certain named termini within certain named counties in the State, and describes the amount of ground needed for each pole, the distance of the poles from each other, and their distance from the railroad track. When the object in the con-

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demnation case is to secure a right of way through a farm or legal subdivision, it probably should be described by such subdivision; but this is for a right of way on an established railroad right of way, the locus of which is accurately fixed by survey, of which there are accessible records. It would seem that there can be no difficulty in so framing a judgment, with such description of the land taken, that parties may know where it is. A railroad track is a fixed monument. *Lake Shore & M. S. Ry. Co. v. Pittsburg, Ft. W. & C. Ry. Co.*, 71 Ill. 40. From this fixed monument other distances may be measured, and there does not appear to be any difficulty in locating exactly the line of construction to be followed by this telegraph company. The complaint describes the property upon which the respondent proposes to locate its telegraph line as the railway of appellant from Salt Lake City to Cannon Station, on the State line between Utah and Idaho. It alleges that the railroad bed is located near the center of its right of way, which is not less than 100 feet in width; that the railroad track is four feet eight and one-half inches gauge, and upon the center of the railroad bed; that the telegraph line to be constructed will consist of poles 30 feet in length, planted firmly in the ground at a depth of not less than five feet, and 30 feet from the outer edge of the railroad track; that the poles will be erected at a distance of 167 feet from each other on the right of way; that each pole will be one foot in diameter at the base and will occupy only one square foot of ground; that no wires will be attached to appellant's fixtures, nor poles erected upon embankments, nor will the wires interfere with any other telegraph line; that the wires are to be attached to cross-arms high enough so that they will not interfere with appellant's property or business; and that the cross-arms will be eight feet in length. This description covers every reasonable intendment of the statute.

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That the telegraph is a public use, and the business of telegraphy is obviously a public business, is well established. It

is a *quasi* public employment,—one not merely exercised for the purpose of private gain, but for the general benefit and welfare of the community. A telegraph company is a public servant, which must serve all alike who make demands upon it, and its right to exercise the power of eminent domain is recognized by our statutes and by numerous decisions of the courts. Rev. St. sec. 3588, subsec. 8; Joyce, *Electric Law*, sec. 274; Lewis, *Em. Dom.* sec. 172. The use, then, to which respondent seeks to apply the land to be condemned is a public use, recognized by law. It is, however, contended that the land sought is already devoted to a public use, and that the condemnation for telegraph purposes will not be devoting it to a more necessary public use. The land which respondent seeks to condemn is not now used for any purpose. Practically it is now idle property, and the new use promises to be one of public utility. The appropriation of the right of way of a railroad not essential to the enjoyment of its franchises and property, for the construction of a telegraph line, is to and for a more necessary public use. *Southern Pac. Ry. Co. v. Southern Cal. Ry. Co.*, 111 Cal. 231, 43 Pac. 602.

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It is contended by appellant that the respondent had no power to locate its telegraph line longitudinally upon appellant's right of way, because when the lands have been once taken, by virtue of the power of eminent domain or otherwise and appropriated to a public use, as is the right of way in controversy, such land cannot again be subjected to another public use, unless such secondary appropriation be authorized by the legislature. The authorities, however, affirm that this rule only applies when the second public use, by reason of its nature or character, necessarily supersedes or destroys the former use. Where, as in this case, the construction of the telegraph line will not materially interfere with the use of appellant's land for railroad purposes, it is clear that the rule does not apply. *Baltimore & O. S. W. R. Co. v. Board of Com'rs* (Ind. Sup.), 58 N. E. 837; *Gold v.*

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Railway Co., 153 Ind. 232, 53 N. E. 285; *Steele v. Empsom*, 142 Ind. 397, 41 N. E. 822; *Southern Pac. R. Co. v. Southern Cal. Ry. Co.*, 111 Cal. 221, 43 Pac. 602; *Southwestern Telegraph & Telephone Co. v. Gulf, C. & S. F. R. Co.* (Tex. Civ. App.), 7 Am. Electl. Cas. 427n, 52 S. W. 106; *St. Louis & C. R. Co. v. Postal Tel. Co.*, 7 Am. Electl. Cas. 426n, 173 Ill. 521, 51 N. E. 382. Mr. Lewis, in his work on Eminent Domain (sec. 269), says: "A telegraph line may be established along a railroad right of way, it being no material interference with the use thereof for railroad purposes." And this is undoubtedly the law. A telegraph line, constructed as proposed, will not, in the nature of things, interfere with the operation of appellant's railroad.

The certificate of the postmaster general of the United States, showing the acceptance by respondent of the provisions of the Act of Congress of July 24, 1866, entitled "An act to aid in the construction of telegraph lines and to secure to the government the use of the same for postal, military, and other purposes," was properly admitted in evidence. By accepting the provisions of this act, respondent is given the right to erect its telegraph lines upon all post roads; and by section 3964 of the Revised Statutes of the United States all railroads are made post roads. But, before respondent can exercise the right thus granted by Congress, it must have fixed and paid to the appellant just compensation for the easement. This is ascertained by resorting to the State law relative to eminent domain. The State law becomes auxiliary to the Act of Congress, and provides the method of condemnation and compensation. In other words, a right is given by this Act of Congress, and the remedy is furnished by the laws of the State. *Postal Tel. Cable Co. v. Southern Pac. R. Co.* (C. C.), 89 Fed. 190; *Gilmer v. Lime Point*, 18 Cal. 229; *Postal Tel. Cable Co. v. Morgan's Louisiana & T. R. & S. S. Co.*, 6 Am. Electl. Cas. 183, 49 La. Ann. 58, 21 South. 183; *Smith v. Drew*, 5 Mass. 513; *Rogers v. Bradshaw*, 20

Johns. 735-744; *Kohl v. U. S.*, 91 U. S. 373, 23 L. Ed. 449; Suth. St. Const. sec. 399.

It is also claimed that the lower court erred in the rule as to the measure of damages which it adopted. It is insisted that the value of the property taken should be measured by the most advantageous use to which it could be put. That rule is undoubtedly correct where one owns property in fee and may put it to any use which he chooses; but it is not the rule, as in this case, where the railroad right of way can only be devoted to railroad uses. Even though the award be nominal, if the sum awarded is a full and fair equivalent for the thing taken, it is just compensation. In the case of a railroad company whose right of way is held for railroad purposes, it is not a question as to what the property would be worth to the most advantageous use to which it could be put; but the question is, how much will the land be damaged for railroad purposes by the erection of the telegraph line? *St. Louis & C. E. R. Co. v. Postal Tel. Co.*, 7 Am. Electl. Cas. 426n, 173 Ill. 508, 51 N. E. 382; *Chicago, B. & Q. R. Co. v. City of Chicago*, 149 Ill. 457, 37 N. E. 78, id., 166 U. S. 226, 17 Sup. Ct. 581, 38 L. Ed. 819. The railroad company holds its right of way strictly for railroad purposes, and is restricted in its use of the same for such purposes. Under this view of the estate which the railroad company has in its right of way, it is difficult to see how the damage from the erection of a telegraph line can be more than nominal. Evidence was introduced by appellant to show damages from the added expense of burning grass from the right of way by reason of the erection of telegraph poles; but such damages are too remote. *Southwestern Telegraph & Telephone Co. v. Gulf, C. & S. F. R. Co.*, 7 Am. Electl. Cas. 427n (Tex. Civ. App.), 52 S. W. 107. Neither can damages be allowed for imaginary dangers. *Jones v. Railroad Co.*, 68 Ill. 380; *Railroad Co. v. Lamb*, 11 Neb. 592, 10 N. W. 493; *Chicago & N. W. Ry. Co. v. Town of Cicero*, 157 Ill. 48, 41 N. E. 640; *Lockie v. Telegraph Co.*, 1 Am. Electl. Cas. 425, 103 Ill. 401. Where, as in this case, a

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telegraph company has a right under the statutes to condemn a right of way on the right of way of a railroad, the damages to be paid to the railroad company are nominal, inasmuch as the railroad company only owns a right of way, and such a right of way is not interfered with by the telegraph company. *Railroad Co. v. Catholic Bishop*, 119 Ill. 529, 10 N. E. 372; *Hilcoat v. Bird*, 10 C. B. 327; *Allen v. City of Boston*, 137 Mass. 319; *In re Albany St.*, 11 Wend. 149, 25 Am. Dec. 618; *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U. S. 258, 17 Sup. Ct. 992, 38 L. Ed. 819.

We find no error in the record, and the judgment of the lower court must be affirmed, with costs.

NOTE 1.—The following recent cases, in addition to those above reported in full, relate to the respective rights of telegraph and telephone companies and abutting land owners:

In *Postal Telegraph Cable Co. v. Eaton*, 170 Ill. 513 (Dec. 22, 1897), and *American Telephone & Telegraph Co. v. Jones*, 78 Ill. App. 372 (Oct. 5, 1898), it was held, that the appliances of a telegraph company do not impose a new burden upon a highway, for which the abutting owner is entitled to compensation.

The same is held, as to telephone companies in *Auerbach v. Cuyahoga Telephone Co et al.*, 7 Ohio Nisi Prius Reports, 633 (Cuyahoga Co. Common Pleas, Jan. 3, 1900); and the contrary in *East Tennessee Teleph. Co. v. Russellville*, 51 S. W. 308 (Kentucky Ct. Ap., May 24, 1899).

In *Andrews v. Delhi & Stamford Teleph. Co.*, 36 Misc. 25 (N. Y. Supreme Court, Delaware Special Term, September, 1901), held, that a telephone company cannot acquire the right as against an abutting owner to maintain its line in a country highway by proof of twenty years superficial possession of its route. Also that an abutting owner may maintain ejectment for the removal of a telephone line, left on his land by a change in the route of a highway.

In *Erwin v. Central Union Telephone Co.*, 46 N. E. 667 (Indiana Supreme Court, April 1, 1897), held, that a bill by an abutting land owner to enjoin a telephone company from laying its conduits under the sidewalk, which does not allege that plaintiff owned the fee in the walk or the street, or that the walk or street was dedicated to the public by one who at the time owned the fee, is demurrable.

In *Spokane v. Colby*, 48 Pac. 248 (Washington Supreme Court, March 17, 1897), held, that a city, having condemned a strip of land for the pur-

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pose of laying and maintaining a water main, can not authorize the erection of a telephone line upon said land, since an additional burden is imposed thereby for which the owner of the land has received no compensation.

In *Telephone & Telegraph Co. v. Shaw*, 102 Tenn. 313 (April 19, 1899), punitive damages were allowed against a telephone company whose employees cut trees by the roadside, after having been previously warned by the abutting owner in whose absence the cutting was done over his wife's protest.

The following additional decisions are upon the subject of abutting owners' rights with relation to trolley railways:

In the following cases it is *held*, that an electric street railway imposes no new burden in a highway: *Canastota Knife Co. v. Newington Tramway Co. et al.*, 36 Atl. 1107 (Connecticut Supreme Court of Errors, 1897); *Pooler v. Falls Road Electric Ry. Co.*, 41 Atl. 1069 (Maryland Court of Appeals, Dec. 20, 1898); *Chicago & W. T. R. Co. v. Gen. Elec. Ry. Co.*, 79 Ill. App. 569 (Jan. 9, 1899); *Rankin v. St. Louis, &c. Ry. Co.*, 98 Fed. 479 (U. S. Circuit Court, S. D., Illinois); *Howe v. West End St. Ry. Co.*, 167 Mass. 46 (Oct. 23, 1896); *Birmingham Ry. & Elec. Co. v. Birmingham Traction Co.*, 122 Ala. 349 (November, 1898); *Reid v. Norfolk City R. Co.*, 94 Va. 117 (Dec. 10, 1896); *Taylor v. Portsmouth, &c., St. Ry.*, 91 Me. 193 (Jan. 3, 1898); *Southern Ry. Co. v. Atlanta Ry. & Power Co. et al.*, 11 Ga. 680 (Aug. 7, 1900); *Baker v. Selma St. & S. Ry. Co.* (Alabama Supreme Court, June 29, 1901), 30 So. 464.

In *Snyder v. Fort Madison St. Ry. Co.*, 105 Iowa, 284 (May 10, 1898), it is *held*, that although the poles of an electric railway, if properly placed, are no ground of complaint to an abutting owner, whether he own the fee of the highway or not; still they must be so placed as not to necessarily interfere with the use of his property; and such interference will be enjoined.

In *McDermott v. Warren, &c., St. Ry. Co.*, 172 Mass. 197 (Nov. 22, 1898), a statute allowing compensation to abutting owners for the maintenance in highways of electric lines for the transmission of intelligence, and in certain instances for electric light and power lines, was construed as not extending to electric street railways.

In *Louisville & Nashville R. Co. v. Bowling Green Railway Co.*, 63 S. W. 4 (Kentucky Court of Appeals, May 7, 1901), *held*, that a city ordinance authorizing a street railway to change its motive power to electricity was valid, though the charter permitted the company to use animal power; and the permission became effective when the company was subsequently authorized by its charter to operate by electricity. Injunction of crossing steam by electric railway denied, despite number of tracks to be crossed and number of daily trains, and danger in running trains by reason of overhead wires.

In *Philadelphia, Wilmington & Baltimore Railroad Co. v. Wilmington City Railway Co.*, 38 Atl. 1067 (Delaware Court of Chancery, May 15, 1897), *held*, that since the trolley railway is not an additional burden, it

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may cross railroad tracks upon a highway the same as any other user thereof.

In the following additional cases the right of telegraph companies to construct and maintain their lines upon and along railroad rights of way is considered:

In *W. U. Tel. Co. v. Ann Arbor R. Co.*, 90 Fed. Rep. 379 (Circuit Court of Appeals, Sixth Circuit, Nov. 9, 1898), *held*, that the Post-roads Act of Congress does not give a telegraph company the right to occupy the right of way of a railroad without its consent; but that a court of equity has power, on the ground of public necessity, to condemn an easement of user for the telegraph company.

In *Postal Tel. Cable Co. of Louisiana v. Louisiana Western R. Co.*, 49 La. Ann. 1270 (May 10, 1897), *held*, that the right secured to telegraph companies by Act of Congress of July 24, 1866, known as the "Post-roads Act," and by Louisiana Acts, 1880, No. 124, is only to acquire an easement, not a fee, in the right of way of railroad companies; and the value of the property to be expropriated in a condemnation proceeding for such purpose is the value of use and occupation, not of the fee.

In *Postal Tel. Cable Co. v. Cleveland, &c., Ry. Co.*, 94 Fed. 234 (U. S. Circuit Court, N. D. Ohio E. D., May 20, 1899), *held*, that the right given telegraph companies to maintain their lines along railroad rights of way is subject to the condemnation laws of the State where the property is situated.

In *Mobile & Ohio R. Co. v. Postal Tel. Cable Co.*, 24 So. Rep. 408 (Alabama Supreme Court, Nov. 5, 1898), *held*, that unless the telegraph line interferes with the use of the railroad, only nominal damages should be awarded in condemnation proceeding.

Savannah, &c., Ry. Co. v. Postal Tel. Cable Co., 112 Ga. 941 (Nov. 22, 1900), indicates what must be established in a condemnation suit for the use by a telegraph company of a railroad right of way.

In *San Antonio & Aransas Pass. Ry. Co. v. S. W. Teleph. & Tel. Co.*, 56 S. W. 201 (Texas Court of Civil Appeals, March 21, 1900), the following is the head-note:

The telephone being a new species of telegraph, the right of eminent domain conferred on telegraph companies by Rev. St. 1895, tit. 21, c. 7, is applicable to telephone companies, although the latter are not mentioned in the statute.

The damages to which a railroad company is entitled, upon condemnation of so much of its right of way as is needed by a telegraph or telephone company in which to place its poles, is to be measured by the extent to which its use of the land has been impaired, and not by the advantages accruing to the telegraph or telephone company.

In *St. Louis & Cairo R. Co. v. Postal Tel. Co. of Illinois*, 173 Ill. 508 (June 18, 1898), *held*, that a telegraph company may, under the Illinois statutes, lawfully condemn a right of way lengthwise upon the right of way of a railroad company.

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Where a telegraph company condemns a railroad right of way the measure of damages is the extent to which the value of the use of the land, embraced within the right of way between the poles and under the wires, by the railroad company is diminished by the use of the same by the telegraph company for its purposes.

In *Savannah, Florida & Western Ry. Co. v. Postal Tel. Cable Co.*, 112 Ga. 941 (Feb. 28, 1901), *held*, to quote from the official head-note in a proceeding instituted by a telegraph company, under the provisions of the act of December 20, 1898, to condemn so much of the right of way of a railroad company as may be necessary for the erection, maintenance, and operation of its telegraph lines, it is not essential that the telegraph company should affirmatively show that, in order to erect, maintain, and operate its telegraph lines between the points proposed, it is necessary for it to condemn such right of way; nor is it essential for it to show that it is necessary for it to use the particular portions of such right of way which it proposes to condemn.

In *S. W. Tel. & Teleph. Co. v. Gulf, Col. & S. F. Ry. Co.*, Texas Court of Civil Appeals, May 31, 1899 (52 S. W. Rep. 106), *held*, that the words "magnetic telegraph," used in article 699, Sayles' Civ. St., giving authority to telegraph companies to appropriate lands necessary for the erection of its poles, etc., apply to telephone companies as well as telegraph companies.

A telegraph and telephone company may condemn, for the construction of its lines, land previously condemned by a railroad company.

The measure of damages in such a case is the damages sustained by reason of the interference of the use by the railway company of its right of way by the placing of the poles of the telegraph company upon such right of way.

In *Gulf, Col. & S. F. Ry. Co. v. S. W. Tel. & Teleph. Co.*, Texas Court of Civil Appeals, March 13, 1901 (61 S. W. 406), *held*, that "it is settled law in this State that a foreign telegraph company, having obtained from the State a permit to do business, has the right of eminent domain for its right of way; and the same rule applies to telephone lines."

In *Texas Midland R. Co. v. S. W. Tel. & Teleph. Co.*, 57 S. W. 312 (Texas Court of Civil Appeals, April 7, 1900), *held*, that in an action by a telephone company to condemn a right to construct its line along the right of way of a railroad, the railroad is only entitled to such damages as might result from the construction and maintenance of the telephone line, and is not entitled to recover the value of the land taken by the telephone company for its right of way.

NOTE 2.—The subject of the rights of owners of land abutting on highways to compensation for the establishment and maintenance of electric lines therein has been considered in notes in previous volumes of this series as follows: Vol. 3, p. 348; vol. 4, p. 218; vol. 5, p. 185, and vol. 6, p. 151;

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and no useful purpose would be served by repeating those notes or the substance.

So far as the telegraph and telephone are concerned, special attention is called to the note of Mr. Keasbey, at page 283 of this volume.

With respect to the cases reported in the present volume, it is held, New York (*Halleran v. Bell Teleph. Co.*, ante, p. 253; *Castle v. Bell Teleph. Co.*, ante, p. 261), and Indiana (*Mages v. Overshiner*, ante, p. 241), and *Coburn v. New Teleph. Co.*, ante, p. 270), that the telephone is not a new servitude. In the last three of said cases the abutter owned the center of the street; and in the last two, the telephone lines were underground conduits. In *Halleran v. Bell Teleph. Co.*, supra, and in *Kruger v. Wisconsin Teleph. Co.*, ante, p. 285, the right to compensation for damages for interference with light, air or access to adjoining premises is recognized. In New Jersey, telephone lines are by statute a new burden. (See *Nicoll v. N. Y. & N. J. Teleph. Co.*, ante, p. 277).

With respect to electric light lines, it is interesting to note in the case of *Palmer v. Larchmont Electric Co.*, ante, p. 298, that the New York Court of Appeals failed to recognize the analogy which the Appellate Division in its decision, 6 Am. Electl. Cas. 128, found between that case and the case of *Eels v. Am. Telph. & Tel. Co.*, 5 Am. Electl. Cas. 92, where it was decided that a telephone line is a new burden in a rural highway. In the *Palmer* case, it is held, that electric light fixtures for public lighting impose no new burden; while in *Carpenter v. Capital Elec. Co.*, ante, p. 312, and *Andreas v. Gas & Elec. Co.*, ante, p. 319, it is held, that in private lighting the contrary is true.

According to the weight of authority now, as in the past, the electric street railway imposes no new servitude. *Snyder v. Ft. Madison St. Ry. Co.*, ante, p. 359; *McDermott v. Warren, & Co., St. Ry. Co.*, ante, p. 368; *La Crosse City Ry. Co. v. Higbie*, ante, p. 369, and *Ehret v. Camden, & N. J. Ry. Co.*, ante, p. 383; though in *Zehren v. Milwaukee Elec. Ry. & Light Co.*, ante, p. 345, the contrary is held, as to rural highways; and the same is intimated in *Jaynes v. Omaha Street Ry. Co.*, ante, p. 328; though in that case access to abutting premises was in fact interfered with, thus causing special injury; compensation for special injury is also held proper in accordance with the uniform rule, in *Snyder v. Ft. Madison St. Ry. Co.*, ante, p. 359. In *Miller v. Detroit, & Co., Ry. Co.*, ante, p. 387, the court does not even protect shade trees from the axe of the trolley lineman, provided only notice of the intended destruction or maiming be given to the owner.

Interference of one electric company with another in their occupation of highways, which was once a fertile source of litigation, as witness many cases in the early volumes of this series, furnishes but three cases for this volume.

The right of telegraph companies to maintain their lines along the right of way of railroad companies is conferred by the Federal statute of July 1866, known as the Post-roads Act, and by statutes of various States.

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One of these, however, have been construed by the courts to authorize such use without compensation. The nature of the State laws is in fact mainly the extension and application of the condemnation laws to such cases. The measure of the railroad companies' damages in condemnation proceedings is the burden of many of the cases upon the subject, of which the last preceding case and those referred to in note 1 are examples.



PART III.

ACTIONS BASED ON INJURIES TO PERSON OR PROPERTY CAUSED DIRECTLY OR INDIRECTLY BY THE ELECTRIC CURRENT.

(481.)



LEAVENWORTH COAL COMPANY V. JOHN RATCHFORD.

Kansas Court of Appeals, Northern Department, E. D., April 30, 1897.

INJURY BY SHOCK FROM LIVE WIRE.

(Head-note by the Court):

Proof that a live electric wire belonging to an electric light plant is broken and lying upon the premises of the plaintiff in the city, in such a condition as to endanger the property of said plaintiff, and that in attempting to remove the same injury resulted to the plaintiff therefrom, makes a *prima facie* case of negligence against the defendant company, entitling the plaintiff to recover for such damages.

In such case the plaintiff has a right to attempt to remove such live wire from his premises, using ordinary care therein; and such an attempt to remove a live wire is not *ipso facto* contributory negligence.

It was the duty of the defendant company, using the streets and alleys of the city of Leavenworth with its poles and overhead wires in lighting the city and houses therein, to employ a sufficient number of men, and to use the best of the devices known, for the purpose of preventing injury to the inhabitants of the city by the displacement or breaking of its wires, and especially so immediately after a storm likely to produce such displacement or breakage.

The fact that a live wire is emitting sparks and a blaze of electric light, apparently jeopardizing the buildings of the plaintiff, will not of itself preclude the plaintiff from attempting, using ordinary prudence, to remove such wire for the purpose of relieving his property from apparent danger of a conflagration; and such an attempt made by the plaintiff will not be held, as a matter of law, to be contributory negligence.

The plaintiff having discovered that a broken wire of the defendant, emitting a blaze of electric fire apparently endangering his property, and in attempting to remove the wire from his buildings apparently jeopardized thereby, using for that purpose a baseball bat, and being injured by coming in contact with the wire by an unexpected movement of the wire caused by its being thrown from the buildings by the use of such bat, such injury is the proximate result of the negligence of the defendant company in permitting its wire to be broken and displaced and to fall upon the plaintiff's buildings.

Cases of this series cited in opinion: *Haynes v. Raleigh Gas Co.*, vol. 5, p. 264; *Uggla v. West End St. Ry. Co.*, vol. 4, p. 389; *Denver Consol. Elec. Co. v. Simpson*, vol. 5, p. 278.

Coal Co. v. Ratchford.

Appeal by defendant below from judgment of District Court of Leavenworth County.

Wm. C. Hook, for plaintiff in error.

Lucien Baker and *C. W. F. Dassler*, for defendant in error.

MAHAN, P. J.: This is an action commenced in the District Court of Leavenworth county by the defendant in error against the plaintiff in error for injuries suffered by coming in contact with an electric light wire used by the defendant in error in its light plant in the city of Leavenworth. The facts appear to be that about the 7th day of May, 1889, in the nighttime, a storm occurred, which ceased about 4 o'clock in the morning. The storm was one of rain, wind, thunder, and lightning, not of unusual violence. About 6 o'clock in the morning the defendant in error had his attention called to the fact that his stable shed in the rear of his premises was on fire. Going out of the door of his residence, he discovered that one of the wires of the plaintiff's plant had broken, and a part of the wire had fallen across the roof of his shed, from which were issuing sparks and a blaze of fire, apparently endangering his buildings. He picked up a baseball bat, ran out to his shed, pushed the wire off of the building onto the ground, and, in falling, the wire in some manner came in contact with his hand. His hand was severely burned, so as to permanently cripple the same. He was severely shocked by the electric current, and was thrown to the ground, apparently dead. He endured very considerable physical suffering arising therefrom. The plaintiff in error was operating at the time something over 40 miles of wire lighting the streets, residences, and business houses of the city of Leavenworth. It kept a day engineer in charge of the plant from 7 in the morning until 7 in the evening, and a night engineer in charge from 7 in the evening until 7 in the morning. In addition to these engineers, the company kept a superintendent and a lineman. On the night, or rather the morning, of the

accident the night engineer was in charge of the plant entirely, and it seems from the evidence that no attention was paid to it by any one except the night engineer until he, discovering some difficulty in the operation of the plant, attempted to call the superintendent by telephone at about 5 o'clock in the morning. In a brief space of time he made three calls by telephone before getting the superintendent, who reported to the power house, and made an investigation of the inside of the plant, and found that something was seriously wrong, but could not locate it. After having satisfied himself that there was nothing wrong inside of the plant, that whatever difficulty there was must be on the line, he turned about and went towards the door, as he says, of the plant, to look after his horse that he had ridden there. From a half to three-quarters of an hour had been spent in this investigation in waiting and talking with the engineer, when a boy arrived, and informed the superintendent that the defendant in error was caught in a wire, and immediately the operation of the plant was suspended, and the superintendent resorted to the residence of the defendant in error, and found him injured as above stated. It was disclosed by the evidence that the company had used an instrument called a "magneto bell" for the purpose of determining whether the circuits of the wires were complete, whether any wires were broken or grounded, and that this bell was the latest discovery and the most improved device for the purpose; but it was not used at the time, although the superintendent had it, and had often used it before. The evidence also discloses the fact that ordinarily the operation of the plant would have to be suspended in order to apply the test of the magneto bell, but it could be applied without suspending the operation of the plant, but with some hazard. The evidence discloses the fact that it would take about three minutes to suspend the operation of the plant and apply the test and resume operation again. There was evidence of expert witnesses—electricians, so called—who testified that, if the conditions existed as shown by the plaintiff's evidence, this test would not have dis-

closed if a wire was broken, inasmuch as the conditions of the wire after broken would apparently disclose from the test a continuous unbroken circuit or current of electricity. The case was tried to the court and a jury, and resulted in a verdict for the defendant in error (plaintiff below) for \$1,200, for which judgment was rendered, and the plaintiff in error (defendant below) now brings the case here for review. In addition to the general verdict, the jury made certain special findings of fact at the request of the plaintiff in error (defendant below).

Counsel for plaintiff in error make 11 assignments of error in their brief. The first is that the jury erred in finding that the failure to use the magneto bell contributed to the accident. The special findings of the jury upon that question are as follows: "Is the magneto bell the best or most approved device for the purpose of ascertaining whether an electric current is broken or not? Ans. Yes." "Did the defendant have such a magneto bell in its power house when the electricity was being generated at the time of the injury complained of? Ans. Yes." "If, when it was discovered in the power house that something was wrong, the machinery had been shut down, or the electric current shut off, and the magneto bell had been used for testing whether the outside circuit was complete on which the broken wire was, would such test have shown that the circuit was complete? Ans. We do not know." "Would such test as mentioned in the last question have indicated that the wire was broken? Ans. We do not know." "(40) Do you find that the negligence of the defendant was the proximate cause of the injury? Ans. Yes." "(43) If you answer question No. 40 'Yes,' then state whether such negligence consisted in not using the magneto bell and testing whether the circuit was complete. Ans. Yes." These are all of the special findings of the jury which indicate that the jury found or held that the failure to use the magneto bell contributed to the accident. The evidence is sufficient to sustain the findings. The trial court passed upon the findings and the evidence in support of them, and approved them, and

we cannot say from the record that the jury was guilty of any wrong or error in making these findings as they did.

The second assignment of error is that the answer of the jury to question No. 43 is against the law and the evidence. Question No. 43 is the last finding quoted above, and I think that counsel have fallen into an error in their reference, because they add, "The failure to shut down the machine was not negligence." Special finding No. 44 is as follows: "If you answer that the defendant was negligent, then state the specific acts or omissions that constituted the defendant's negligence which was the cause of the injury? Ans. For not shutting down the machine when they found there was something wrong." Counsel doubtless intended to refer to special finding No. 44 instead of No. 43 in this second assignment. We cannot say that this finding is against the evidence; on the contrary, the evidence abundantly supports it. The engineer left in charge of the works was apprised that there was something wrong with the plant more than an hour before the happening of the injury. The superintendent was called, and he had fully three-fourths of an hour's notice of some disturbance in the operation of the plant before the happening of the injury. He at once discovered that it was not in connection with anything inside of the plant, but that the difficulty was upon the line. A company or person operating such dangerous machinery as an electric plant for lighting, using such a dangerous element as electricity, ought to be held to the strictest rule of care and attention in its use, to the highest degree of care and attention exercised by men in the management of their affairs. They know—they must be held to know—the dangers that attend its operation; that a wire—a "live wire," as they are called—is exceedingly dangerous to both men and domestic animals; and in a crowded street, with a profusion of wires occupying, above ground, the public highways, where people must pass and repass in the performance of their duties and social intercourse; and it was not too much to say, upon the evidence, that the defendant company had such

notice of danger as to put their agents upon their guard, and require them to exercise all the means and devices they had at hand to prevent any misfortune that might arise therefrom. And, indeed, it was a small thing to do to suspend the running of their engine, or suspend their electric current, which, it appears from the evidence, they could have done in three minutes and have applied the test that they had at hand, or even to ascertain that nothing had transpired in connection with this dangerous element which they were using, from which harm might come to the persons or property of the inhabitants of the city. The answer is not against the law or the evidence.

The third assignment of error is that the court, at the request of the plaintiff, erroneously instructed the jury in the following instruction: "Second. If the jury, from the evidence, believe that the defendant could, by the exercise of due care and caution in and about its business of lighting the streets, stores, and buildings aforesaid, have prevented one of its wires from falling upon the premises and upon the shed or barn of the plaintiff, then it was its duty to do so; and if the same could have been prevented by the exercise of due care and caution, then it was the duty of the defendant to have exercised such care and caution; and if you find that such care and caution was not exercised, and that one of the wires of the defendant, because thereof, did fall into or upon the barn or shed of the plaintiff, then the defendant would in any case be guilty of negligence." The criticism upon this instruction is the expression "due care and caution;" that is, that the company might, by the exercise of due care and caution, have avoided inflicting the injury upon the plaintiff. Taking this instruction in connection with the other instructions, it is not open to any criticism, because the court had told the jury what care or degree of care and attention constituted due care and caution upon its part. Instructions must be taken together, and not a single one, or a single paragraph, or a single clause considered by itself for the purpose of saying that the court erred therein.

The fourth assignment of error is that the defendant (plaintiff in error) requested the court to instruct the jury as follows, which the court refused to do, to wit: "If the jury finds from the evidence that the injury was done to the plaintiff by means of one of the defendant's electric wires, no presumption arises from that fact alone that the defendant was negligent in such matters." In the first place, this principle of law was covered by the court in its general instructions.

The fifth assignment of error is that the court refused to give to the jury, at the request of the plaintiff in error, the following instructions: "Sixth. If the jury should find that ignorance of the plaintiff of the fact that an electric light wire emitting sparks and flames might be dangerous to handle induced him to so act with reference to such wire as to cause the injury complained of, you should find for the defendant. Seventh. If the jury should find that the ignorance of the plaintiff of the fact that an electric wire emitting sparks and flames might be dangerous to handle induced him to so act with reference to such wire as to contribute to the injury complained of, you should find for the defendant. Eighth. If the jury should find from the evidence that the plaintiff voluntarily picked up the electric light wire with his hand, knowing the same to be alive, or to be emitting sparks and flames, and the injury was thereby caused, you should find for the defendant." "Thirteenth. If the jury find from the evidence that the electric wire which plaintiff came in contact with was emitting sparks and flames at different points, and the plaintiff observed and knew such to be the case, then he should have known that a personal contact with such wire might cause injury. Fourteenth. If the plaintiff knew that the said wire was emitting sparks and flames, then he should have known that it was charged with electricity. Fifteenth. The plaintiff must, as a matter of law, have known that a broken electric light wire, charged with electricity, might be dangerous to him if he came in contact with it. Sixteenth. If the plaintiff conducted himself, or acted in his endeavor to re-

move the electric light wire which caused the injury, as though the same were harmless under any circumstances, and because of his so acting and conducting himself the injury complained of was incurred, you should find for the defendant." These instructions are based upon the assumption that the plaintiff voluntarily came in contact with the wire. It is assumed that he was bound to know that an electric wire emitting sparks and flames of fire was dangerous to handle, and that he ought not to have attempted to remove it from his barn under any circumstances. This is not the law applicable to the case. The question to be submitted to the jury was, did he use due care and attention in attempting to remove it from his buildings? and that his contact with the wire was a willful contact; that he purposely took hold of or came in contact with the wire. And the evidence does not support the assumption, or either of the assumptions. Nor can it be said, as a matter of law, that in the year 1889 every person or any person was bound to know that an electric wire was such a dangerous instrument that a person whose property was apparently jeopardized by its presence ought not to attempt in any manner to remove it.

The sixth assignment of error is as follows: "In the general instructions to the jury the court, in passing upon the question of contributory negligence, virtually said that, in order to defeat a recovery, the plaintiff must knowingly have contributed to his own injury." The instruction referred to is as follows: "But if they were convinced by what the law calls a preponderance of the evidence that they were negligent, then he would not be entitled to a verdict if he contributed—in the meaning of the law, which I will explain—to his own injury; that is, if he knowingly contributed to his own injury." Subsequently the court did explain fully what he meant by "knowingly contributing to his own injury;" and, taking the entire instructions together, the jury could not have been misled thereby. The contention of counsel is based upon the rule that the plaintiff was bound to know and act upon the knowledge that this wire was

such a dangerous wire as would preclude him from in any manner attempting to remove it from his premises; but this is not the law in the case.

The seventh assignment of error is as follows: "Upon the question of the degree of care and diligence incumbent upon the defendant company to exercise, the court instructed the jury as follows: 'And that it would be its duty, under such circumstances, as far as they could do so by the exercise of the highest care and diligence, to prevent an injury of this character, it is hardly necessary for me to say; because the jury will infer, from what they heard in this case, and probably from their common knowledge of such subjects, that the electric light machine, including the wires, is a dangerous machine,' etc. And again: 'As to the care that is necessary to be used by the defendant in the suit, I will say to you that this being a dangerous machine for the purpose of producing and distributing electricity in the city, the law holds the defendant to the highest degree of care known for the purpose of preventing injuries arising from the use of that instrument; the law being that the care that a person must take in the use of an appliance that may be dangerous must increase in proportion to the danger in the use of the appliance, so that, if this is a highly dangerous instrument, the highest care would be 'necessary in providing against injuries from its use.'"

This is a fair statement of the law of the case, as favorable to the defendant as it was entitled to under the facts. We do not deem it necessary to enter into an argument on this proposition. The instructions are in accord with the authorities upon that subject. *Haynes v. Gas Co.* (N. C.), 5 Am. Electl. Cas. 264, 19 S. E. 344; *Ugla v. Railway Co.*, 4 Am. Electl. Cas. 389, 160 Mass. 351, 35 N. E. 1126; *Electric Co. v. Simpson* (Colo. Sup.), 5 Am. Electl. Cas. 278, 41 Pac. 499; *Larson v. Railway Co.*, 56 Ill. App. 263.

The eighth assignment of error is that the court refused to instruct the jury to find for defendant. This assignment is based upon the proposition that the injury was not the proxi-

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mate result of negligence on the part of the defendant. The claim is that the attempt of the plaintiff to remove the wire from his building was the interposition of a new cause; in other words, that the company was not held, under the law, to have contemplated that when they were guilty of such negligence as leaving a live wire about the highways of the city or the premises of one of its inhabitants that a person would not be injured by it, in the ordinary course of events, by attempting to remove it from his premises for the purpose of avoiding danger to his property. The position is untenable. The plaintiff's property was apparently exposed to a conflagration by the presence of the fire. The court told the jury that if it was a fact that the wire, in the condition in which it was, did endanger the plaintiff's property,—not apparently, but in fact,—and the company knew it, then the negligence of the defendant in permitting the wire to be there was the proximate cause of the injury. This was as favorable a presentation of the law to the facts as the defendant could ask. The assumption of counsel for defendant in their brief is that the plaintiff might, in the attempt to save human life, attempt to remove the wire from his property, but not to save his property. It will not do to say, as a proposition of law, that where a person or company is engaged in the exercise of as dangerous a business as that of the defendant, they may expose the property of citizens to a conflagration without the right to attempt to preserve the same. The court, upon the trial, in its instructions, told the jury that it was the duty of the plaintiff, when he saw that his property had been exposed to danger, even by the 'negligent act of the defendant, to exercise reasonable care to prevent the injury if he discovered it in time. This is the universal rule of law. It is the rule founded on honesty and integrity, and ought to apply in all its force to the defendant company under the circumstances in this case.

The ninth contention of the plaintiff in error is that the court refused to submit the question to the jury as to whether the

plaintiff, in building his improvements, had encroached upon the alley, and whether or not a part of his improvements were beyond the line of his property, and in the alley. One of the allegations of the petition is that the defendant, in constructing its line of wires in the city, and especially in the alley in the rear of the plaintiff's premises, so constructed it that the wires hung over and were liable to fall upon the improvements of the plaintiff. It appeared by the evidence that the plaintiff knew of the facts at the time of the construction of the line, and that his conduct with reference thereto amounted to a license to the defendant company to so construct its line and maintain it in the position it did, and that, therefore, the question of negligence on the part of the defendant company in the construction of its line was out of the case. This ruling of the court was most favorable to the defendant, and, instead of being prejudicial to its interest, was in its interest, and about which the company has no cause to complain. A part of this assignment of error is that the court refused to submit to the jury questions of fact as to whether the plaintiff's improvements encroached upon the alley or not. Upon the holding of the court that the plaintiff could not rely upon this allegation of negligence, it became utterly immaterial, and the court properly refused to submit to the jury any special findings upon that subject.

The tenth assignment of error is that the answer to the forty-third finding submitted by the defendant to the jury indicates that the jury was prejudiced against the plaintiff, and that it had no show for a fair trial. It is only necessary to say, in this connection, that after a very careful consideration of the record, covering the whole course of the trial, including the instructions of the court, we are impelled to the conclusion that the court treated the defendant (plaintiff in error) most fairly and considerately; that there is no indication of any bias or prejudice upon the part of either the court or the jury; that the findings of the jury referred to, taken in connection with the other findings of the jury, and the facts and circumstances of the case,

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do not indicate, as suggested by counsel, that it entertained any bias or prejudice or feeling of unfairness towards the plaintiff in error whatever.

The eleventh assignment of error is that the court refused the motion for a new trial. There being no error in the record, the trial having been a fair one, the plaintiff in error having been denied no right or privilege to which it was entitled under the law, the instructions, taken as a whole, being most favorable to the plaintiff in error, the result being a fair and just one, there was no ground for a new trial, and the motion was properly overruled. The judgment of the lower court is affirmed. All the judges concurring.

NOTE.—See note 2 at end of Part III; also, note to next case.

THE TRENTON PASSENGER RAILWAY COMPANY (Consolidated)
v. CHARLES S. COOPER.

SAME v. SAMUEL M. BENNETT.

New Jersey Court of Errors and Appeals, June 28, 1897.

(60 N. J. L. 219.)

ELECTRIC STREET RAILWAY—INJURY BY SHOCK—RES IPSA LOQUITUR.

(Head-note by the Court):

Escape of electricity from a street railway, to the injury of a horse being driven on a public street, is presumptive proof of negligence in the operation of the railway. "*Res ipsa loquitur*."

On error to the Supreme Court.

James Buchanan, for plaintiff in error.

Garret D. W. Vroom and *John H. Backes*, for defendants in error.

COLLINS, J.: These two causes were argued together upon identical bills of exception and assignments of error, the original actions having been tried together in the Mercer Circuit. The actions were based upon alleged negligence in the lawful operation by means of electricity of a street railway in the city of Trenton. In such operation an electric current was conducted through rails laid on the street, the ends of the rails being fastened together with metallic ties by a process called in the declaration and testimony "bonding." The negligence averred was in insufficient or defective bonding, permitting the escape of electricity. In one of the actions the result averred was injury to a valuable horse owned and being driven by the plaintiff Cooper, and in the other personal injury to the plaintiff Bennett, who was Cooper's hostler and was riding with him. The horse ran away, and both men were thrown from the carriage. The plaintiffs recovered damages, and the judgments have been removed by writs of error to this court.

Error is first assigned upon refusal to nonsuit. The contention is that, as the averments of negligence were limited to the bonding of the rails, the plaintiffs were obliged to point out and establish some particular defect or insufficiency in such bonding. I do not assent to this view. It would have been sufficient to aver that electricity was, through negligence, permitted to escape from the rails; but, as it appeared in the case that such escape was only possible at the ends of the rails, it was a necessary conclusion that, if it occurred, it must have been due to insufficient or defective bonding. It must be assumed that with proper and sufficient bonds the rails would have carried a current of electricity with safety to horses stepping upon them. Otherwise the operation of the railway in a public street by means of such a current passing through its rails was *ipso facto* a nuisance. No legislation has authorized such an infringement on the rights of the public in a highway. If, therefore, electricity did escape from the rails, that fact was presumptive proof of negligence. The case comes clearly within the bounds

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set by this court for the right of a plaintiff to say, "*Res ipsa loquitur*." *Bahr v. Lombard, Ayres & Co.*, 24 Vroom, 23. Of course, proof of a latent defect or of a break in a bond, which the managers of the railway could not with due diligence have learned, might rebut the presumption of negligence, but such proof appeared in the plaintiff's case. Assuming that there was proof tending to show that electricity did escape from the company's rails and affect the horse, it was the duty of the trial judge to require a defense. There was proof sufficient to go to the jury of such escape and shock. The horse, previously docile, and accustomed to the city streets, was being driven across the railway track. Immediately after stepping on a rail he stopped, shook, quivered, and then plunged forward, and ran so violently as to overcome all efforts to restrain him. A subsequent examination by a veterinary surgeon revealed symptoms of shock by electricity. The motion to nonsuit was properly denied, and, as no conclusive rebuttal of such presumption of negligence was established by the defense, there was no support for the renewal of the motion at the close of the evidence. The case was one for the jury.

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The judgment should be affirmed.

GARRISON, J., dissents in the Cooper case.

NOTE.—Even though the duty of the defendant may not go so far as to insure against accident, there are cases in which the fact that harm done is evidence of want of care. The facts which prove the accident also speak of the negligence of the defendant and throw upon him the burden of showing that the accident was due to some other cause than his want of care. The maxim applied in such cases is *res ipsa loquitur*. It can only be applied, however, when the accident is such that the natural and reasonable inference is that it would not have happened but for the negligence of the defendant or when it appears that the facts are so far within his exclusive knowledge that it is reasonable to call on him for an explanation of the accident, and it must always be remembered that it is a general rule of law that the mere proof of the occurrence of an accident raises no presumption of negligence. *Keasbey on Electric Wires*, section 27. The maxim was applied to the falling of electric apparatus set up in the street in *Uggle v. West End St. Ry. Co.*, 160 Mass. 351, 35 N. E. Rep. 120.

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4 Am. Electl. Cas. 389; *Excelsior Electric Co. v. Sweet*, 57 N. J. Law, 224, 30 Atl. Rep. 553; to cases of electric shock, in *Ennis v. Gray*, 87 Hun, 355, 34 N. Y. Supp. 379, 5 Am. Electl. Cas. 325; *Clark v. Nassau El. Ry. Co.* (N. Y.), 9 App. Div. 57, 6 Am. Electl. Cas. 234, 49 N. Y. Supp. 78; *Jones v. Union Ry. Co.*, 18 App. Div. (N. Y.) 267, 7 Am. Electl. Cas. 447, 41 N. Y. Supp. 321; *O'Flaherty v. Nassau El. Ry. Co.*, 34 App. Div. (N. Y.) 14, 7 Am. Electl. Cas. —, 54 N. Y. Supp. 96; *Suburban Electric Co. v. Nugent*, 58 N. J. Law, 658, 6 Am. Electl. Cas. 238, 34 Atl. Rep. 1069; *Larson v. Central Ry. Co.*, 56 Ill. App. 263; *Snyder v. Wheeling El. Co.*, 43 W. Va. 661, 7 Am. Electl. Cas. 473, 28 S. E. Rep. 733, 29 L. R. A. 499, with note and briefs; *Western Union Teleg. Co. v. State*, 82 Md. 293, 6 Am. Electl. Cas. 210; *Haynes v. Raleigh Gas Co.*, 114 N. Car. 203, 5 Am. Electl. Cas. 264, 19 S. E. Rep. 344; *Seybolt v. N. Y., L. E. & W. R. R. Co.*, 95 N. Y. 502; *Denver Tramway Co. v. Reid*, 4 Colo. App. 53, 35 Pac. Rep. 269, 4 Am. Electl. Cas. 332. A distinction was taken in a case where a man was injured indirectly, his horse being frightened by the fall of a live wire. *Kepner v. Harrisburg Traction Co.*, 168 Pa. St. 497, 32 Atl. Rep. 44.

As to the meaning and application of the maxim *res ipsa loquitur*, see *Bahr v. Lombard, Ayres & Co.*, 53 N. J. Law, 233, 23 Atl. Rep. 167; *Byrne v. Boadle*, 2 Hurlst & Colt. 722; *Scott v. London & St. Katharine Dock Co.*, 3 Hurlst & Colt. 596; *Kearney v. London, Brighton & South Coast Ry. Co.*, L. R. 5 Q. B. 411, 6 id. 759; *Mullen v. St. John*, 57 N. Y. 567; *Tarry v. Ashton*, 1 Q. B. Div. 314; *Sheridan v. Foley*, 58 N. J. Law, 230, 33 Atl. Rep. 484; Pollock on Torts, 422; Smith on Negligence, 248; Shearman & Redfield on Negl., sec. 59. For an examination of the cases on this subject relating to electric wires, see, Keasbey on Electric Wires, sec. 232; sec. 271-273, 2d ed.

E. Q. K.

WILLIAM J. JONES, Respondent, v. UNION RAILWAY COMPANY
OF NEW YORK CITY, Appellant.

New York Supreme Court, Appellate Division, First Department, June,
1897.

(19 App. Div. 316.)

INJURY BY SHOCK—RES IPSA LOQUITUR—NEGLIGENCE—BURDEN OF
PROOF.

The plaintiff, while standing in the street at night, was struck on the
head by the end of a span wire used to support defendant's trolley wire,

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the span wire having broken and fallen to the sidewalk; the wire burned through his hat, destroyed an eye and inflicted other injuries.

Held, that the doctrine, *res ipsa loquitur*, applied, and that there was a presumption of negligence which defendant must rebut. That the fact that the plaintiff was not a passenger did not render the rule inapplicable.

The span wire was a single steel wire, while the more modern practice is to use a braided wire of several strands; but at the time of the accident both kinds were in common use. *Held*, that negligence could not be predicated of the use of a single wire.

In addition to the above facts, there was evidence that the broken end of wire was "drawn to a pencil point;" that in close proximity to the span wire, about two inches away the day before the accident, ran an electric light wire, placed there before the defendant's wire was erected; that the electric light wire carries a current of 3,000 volts, the trolley wire a current of 500 volts, and the span wire is supposed to carry no current; that insulation is not always perfect; that it is affected by moisture and the current may be worn off; that there was no possible source of heat except an electric current.

Held, that it was a question for the jury whether the defendant had constructed and maintained its plant reasonably safe and secure for the public; also whether it should have anticipated danger from the close proximity of the wires and taken measures to guard against that danger.

The court charged that in absence of contributory negligence, the defendant was liable for plaintiff's injury, provided the breaking of the wire could be attributed to defendant's want of reasonable care. *Held*, error; that the plaintiff must establish by a fair preponderance of proof not only that the breaking of the wire could be attributed to the want of reasonable care, but as a matter of fact was actually due to that cause.

The court charged, in substance, that when the plaintiff rested, the burden of proof was upon the defendant. *Held*, error.

Cases of this series cited in opinion: *Gilmore v. Brooklyn Heights R. Co.*, vol. 6, p. 432; *Clarke v. Nassau Electric R. Co.*, vol. 6, p. 234.

Appeal by defendant from judgment of Supreme Court, Kings County, entered upon the verdict of a jury, and also from an order denying motion for new trial upon the minutes. Appeal transferred from First to Second Department.

William N. Cohen and *Nathan Ottinger*, for the appellant.

William P. Burr, for the respondent.

CULLEN, J.: This action is to recover damages for personal injuries alleged to have been caused by the negligence of the defendant. The defendant maintains a trolley railroad line on Third avenue in the city of New York. The occurrence which is the subject of the action happened about two o'clock on the night of June 4, 1893. The plaintiff was standing at or near the corner of Third avenue and the Boulevard, when one of the span wires that support the trolley wires of defendant's railroad broke. The wire swung to the sidewalk, where plaintiff was standing, the broken end striking his hat; the wire burned through the brim of his hat and came in contact with one of his eyes, he thereupon falling unconscious. The eye was destroyed, and the evidence tended to show that the plaintiff's brain and faculties were seriously impaired. At the scene of this occurrence an electric light company maintains a circuit of lights and wires. The electric light wires had been strung before the defendant's railroad was constructed, and these wires came in close proximity with the span wires of the railroad.

We think the case was properly one for the jury. A large portion of the appellant's brief is devoted to the argument that, at the close of the plaintiff's case, the defendant's ownership of the wire which broke and injured the plaintiff had not been established, and that no case had been made out to which the defendant was called upon to respond. This is of no importance, for it appeared by the defendant's evidence, without dispute, that the wire which broke and caused the injury was its span wire. When the defendant enters into its proof, the question never is, whether the plaintiff's evidence is sufficient to justify the submission of the case to the jury, but whether, on the whole case, there is a question of fact as to the defendant's liability. If, at the close of a plaintiff's case, the defendant is confident that no cause of action has been made out, the only method of securing a review of an erroneous ruling on the point is to let the case stand without further evidence. If the defendant enters upon its evidence, it takes the chances of supplying the deficiencies of the plaintiff's case.

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At the close of the testimony the case stood substantially in this position: It was undisputed that the defendant's span wire broke and, falling, struck the plaintiff's eye, destroying it. When this fact appeared, we think that the doctrine *res ipsa loquitur* applied, and that there was a presumption of negligence on the defendant's part which it was called upon to explain or rebut. This proposition the defendant vigorously assails, but we do not see why the rule does not apply. The *res* in this case was not the electric current, but the breaking of the defendant's wire. It was the wire that inflicted the injury. No matter how intense the electric current, had the wire not broken and fallen on the plaintiff no injury could have happened him. Nor is the rule inapplicable because the plaintiff was not a passenger of the defendant, but a mere third party, to whom it owed only the duty of ordinary care. The leading case in this State on the subject, that of *Mullen v. St. John*, 57 N. Y. 567, occurred between parties between whom there was no contractual relation. A building fell or collapsed and injured a traveler on the highway. It was held to be incumbent on the defendant to show that the building fell without fault on his part. The principle has been twice applied by us within the last few months. In *Gilmore v. Brooklyn Heights R. R. Co.*, 6 Am. Electl. Cas. 432, 6 App. Div. 117, the plaintiff, when entering the car and on the platform, was struck by the brake handle, which was suddenly set free in some unexplained manner. It was held that the occurrence called for explanation, and that a nonsuit was erroneous. In *Clarke v. Nassau Electric R. R. Co.*, 6 Am. Electl. Cas. 234, 9 App. Div. 51, the plaintiff's horse, while crossing the rails of defendant's railroad, was killed by an electric shock from some source. The defendant operated its road by electricity. It was there said by Justice BARTLETT: "The plaintiff, or any other traveler suffering a similar misadventure, could have no means of ascertaining the precise state of the defendant's plant in respect to insulation, or in respect to contact with other sources of electrical energy. The fact

that the defendant brought electricity into the street for use as a motive power, and the fact that electricity so employed was capable of escaping in such a way as to produce the casualty which actually took place, were sufficient, taken together, to justify the inference that the accident was due to the agency of the defendant, in the absence of proof that it was otherwise caused. The maxim *res ipsa loquitur* is directly applicable." The case of *Searles v. Manhattan Railway Co.*, 101 N. Y. 661, is not in point. There the plaintiff was injured by a cinder from a locomotive on the elevated railroad. It was held that the mere escape of the spark or cinder did not establish negligence. But the ground of this decision was that, so far from the escape of sparks from a locomotive being presumptive evidence of negligence, it is a matter of common knowledge that no locomotive can be run without the escape of sparks. Had the sparks or cinders been shown to have been of unusual size, or to have been emitted in extraordinary quantities, then undoubtedly the rule of *res ipsa loquitur* would have applied and the defendant been called upon to explain the occurrence.

The defendant's evidence was to the effect that the span wire in question, a No. 4 gauge, galvanized steel wire, was of the kind usually employed at the time for such purpose in the construction of trolley roads. It appears that the more recent practice is to substitute for a single wire a braided wire or wire composed of several strands; but even the plaintiff's experts, while criticising the use of the single wire, concede that, at the time of the accident, the use of such a wire was as common as that of braided wire. The identity of the particular wire seems to have been conceded. We think, therefore, that the defendant could not be charged with negligence in using wire of an improper character. The testimony of the defendant's lineman showed that the broken end was, as he termed it, "drawn to a pencil point." Now, if this was the condition of the wire when it was originally put up, or the wire had been worn to that size by ordinary use, I think the jury could have found that there was negligence either in stringing or maintaining a wire with

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such a defect. If the condition of the wire was caused by something extraordinary happening at the time, or immediately before the wire broke, it plainly proceeded from electrical causes. If this theory be correct, then a current was communicated to the span wire (which should be dead) from either the trolley wire or the wire of the electric light company. This current fused the wire and caused it to break. We are not sufficiently versed in the science of electricity to express with certainty an opinion as to which was the source of the current. But, even to us, it appears clear that at some point the wire must have become charged with a current of electricity. When the wire struck the plaintiff it must have been heated to a very high degree, for it burned a hole through his hat as well as burning out his eye. There was no possible source of heat in the vicinity except such as could be developed from the passage of an electric current. Therefore, the wire must either have had an electric current passing through it before it broke and been heated by the current, or after it broke it must have fallen on a live wire and received a current from it. If the latter was the fact, then, as already stated, the jury might find the defendant negligent on account of the attenuated condition of the wire. If the former was the case, it becomes necessary to consider whether, in any aspect of the evidence, the jury could have attributed negligence to the defendant.

The evidence of the lineman was that the wire broke some six feet beyond the insulator which carried the trolley wire. From this fact I should think it probable that the current did not proceed from the trolley wire, though if it did it would be for the defendant to explain why the trolley wire was not resting on the insulator. If the current did not proceed from the trolley wire it must have come from the electric light wire, and it now remains for us to consider whether, assuming that this was the cause of the breaking of the span wire, the jury could hold the defendant responsible for it. The electric light wires were strung on the street before the trolley wires. Presumably,

they were lawfully strung there. The defendant owed the duty of constructing its plant on the street in a manner reasonably safe and secure so far as the public who might use the street were concerned. It is evident from the testimony (if indeed it is not a matter of common knowledge of which we may take notice) that the great danger in highways, from the presence of numerous wires, some of them carrying electric currents of high intensity, is that those wires may come in contact, and a wire designed either to carry no current, or transmit one of but slight power, may become charged with a force dangerous to life. Electric light wires, of all wires in common use, carry the most powerful currents. It is stated in the testimony that the ordinary intensity of such a current is 3,000 volts, while that of the trolley wire is only 500 volts, and as for telephone or telegraph wires, that the current through them is of such slight intensity as not to be regarded. It also appears by the evidence that the insulation of wires is not always perfect; that moisture tends to render substances conductors of electric current which, when dry, would be insulators; that, also, the insulating material may be worn off by use or time.

From this I think it fairly might have been claimed before the jury that it was dangerous to string the span wires too close to the electric light wires, at least without taking particular precautions against the danger of the light wire coming in contact with the span wire. The defendant's lineman testifies that when he inspected the wires on the afternoon before the accident, the electric light wire was, as far as he could judge, about two inches from the span wire. It was the duty of the defendant not only to construct, but to maintain its plant reasonably safe and secure for the public. And, whether the wires were originally strung so close together, or whether the light wire had fallen or sagged towards the span wire, it was a question of fact whether the defendant should not have anticipated danger from the close proximity of the wires and have taken measures to guard against that danger. We have thus discussed

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at much length the facts of the case in answer to the elaborate argument of the defendant that there was no sufficient evidence upon which its negligence could be predicated. We do not say that the two conclusions we have stated should be found from the evidence. We merely say that the jury could have found them from the evidence, and that is sufficient to answer the motion of a nonsuit.

We are, however, of opinion that there were errors in the charge of the learned trial judge which require a reversal of this judgment. Substantially at the close of the charge the trial judge said: "In the absence of contributory negligence on the part of the plaintiff the defendant is liable for any injury sustained by the plaintiff as a result of the accident under consideration, provided the breaking of the wire can be attributed to the want of reasonable care on the part of the defendant. In the ordinary course of things a span wire used for the purposes to which the wire in question was applied does not break and fall; it is, therefore, a reasonable presumption, in the absence of any explanation, that the accident resulted from the want of ordinary care on the part of the defendant. The presumption is not controlling, and it is for you to say whether it has been successfully overcome by the testimony. When the plaintiff rested, the burden was upon the defendant of showing such facts as warrant the conclusion that the accident was due to circumstances which the exercise of ordinary care could not foresee and guard against. Has the defendant met this obligation? If it has, your verdict must be for the defendant." In the beginning of the charge the judge had correctly instructed the jury that the burden of proof was on the plaintiff, and possibly had the matter rested at the close of the extract quoted we might feel justified in considering the charge as a whole and construing this portion in connection with what had previously been said. But after a long discussion between the court and counsel on both sides, the court said: "On that branch of the case I will read you again, that there may be no mistake, what

I consider the law." The judge then repeated the portion of the charge already quoted. To the three propositions contained in this portion of the charge the counsel for the appellant duly severally excepted, and of those propositions two, we think, were clearly erroneous. It was not sufficient, to render the defendant liable for the injuries sustained by the plaintiff, that the breaking of the wire could be attributed to the want of reasonable care. To render the defendant liable it was requisite that the plaintiff should establish by a fair preponderance of proof not only that the breaking of the wire could be attributed to the want of reasonable care, but as a matter of fact, was actually due to that cause.

The second proposition, substantially the rule of *res ipsa loquitur*, as we have already stated, is correct.

The third proposition is: "When the plaintiff rested, the burden was upon the defendant of showing such facts as warrant the conclusion that the accident was due to circumstances which the exercise of ordinary care could not foresee and guard against. Has the defendant met this obligation? If it has, your verdict must be for the defendant." If the fair interpretation of this instruction was only that when the plaintiff rested the defendant was called upon for explanation, it would not be objectionable; but I do not think it can be considered as so limited. Taken in connection with the preceding proposition I think its true construction is that the burden of proof was on the defendant. So construed, the charge was plainly erroneous. The burden of proof always remains upon the party who has the affirmative of the issue. From certain facts presumptions may arise. Those presumptions are merely evidence, like other proof in the case. When the case was finally submitted to the jury, weighing presumptions, proofs and all the evidence, the burden of proof was on the plaintiff to establish affirmatively the negligence of the defendant. *Whitlatch v. The Fidelity & Casualty Co.*, 149 N. Y. 45; *Weigley v. Kneeland*, 18 App. Div. 47. A presumption does not shift the burden of proof.

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This was the final statement of the court to the jury and was given to the jury as a proposition or series of propositions complete in themselves and embracing the whole law on the subject included in them. We, therefore, think the error is too serious to be overlooked. The judgment and order appealed from should be reversed and a new trial granted, costs to abide the event.

All concurred.

Judgment and order reversed and a new trial granted, costs to abide the event.

NOTE.—See note to preceding case; also note 2 at end of Part III.

KATE DWYER, as Administratrix, etc., of MICHAEL DWYER,
Deceased, Respondent, v. BUFFALO GENERAL ELECTRIC COM-
PANY, Appellant.

New York Supreme Court, Appellate Division, Fourth Department, July,
1897.

(20 App. Div. 124.)

INJURY BY ELECTRIC SHOCK—RES IPSA LOQUITUR.

An iron brace supporting a cross-arm upon a telegraph pole was in contact with an electric light wire, subsequently placed, and the insulation upon the latter wire became abraded by such contact. The facts of contact and abrasion were not visible from the street below. The telegraph wires carried a current of 160 volts; the electric light wires of 1,100 volts. Plaintiff's intestate, a lineman employed by the telegraph company, ascended its pole, in the line of his duty, took hold of the brace, threw up his arms and fell to the pavement dead. Across the palm of one hand was a mark of rust. A medical witness who examined the body testified, not without contradiction, that there were conditions indicating an electric shock. The intestate wore no gloves. There was evidence that it was customary for linemen to handle wires of the telegraph company without gloves and without receiving injury.

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In an action against the electric light company, in which it was charged that death was due to its negligence in constructing or maintaining its appliances, *held*, questions for the jury to determine, whether death was caused by shock, either directly or indirectly as a result of the fall; and if caused by shock, whether it was received from the wires of the defendant or of the telegraph company or from trolley wires in the vicinity.

The facts that defendant's wires carried a death dealing current; that its wire was in contact with the brace and the insulation abraded thereby, and that plaintiff's intestate was in a position where he might have touched the brace, being conceded by the defendant, *held*, that the doctrine of *res ipsa loquitur* applied, the court citing the following cases of this series: *Clarke v. Nassau Elec. Ry. Co.*, vol. 8, p. 234; *Ennis v. Gray*, vol. 5, p. 825.

Testimony that a flash of light was occasioned by touching a wire to the brace is a statement of fact, not of opinion.

Appeal by defendant from order of Supreme Court, Erie Trial Term, denying motion for new trial upon the minutes after verdict for plaintiff upon trial.

Tracy C. Becker, for the appellant.

Ansley Wilcox, for the respondent.

HARDIN, P. J.: On the 23d of August, 1895, Michael Dwyer, the husband of the plaintiff, in William street in the city of Buffalo, lost his life, and the plaintiff brings this action to recover damages.

A trial was had at the March Trial Term in Erie county before the court and a jury, and a verdict of \$6,000 was rendered in favor of the plaintiff.

It is alleged in the complaint that prior to that time the defendant had constructed one of its lines for the transmission of electricity along the northerly side of William street in the city of Buffalo, and that at the northwesterly corner of William street and the tracks of the New York Central and Hudson River Railroad Company, where the same cross William street, defendant had erected a pole to carry its said electric light

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wires, "and had negligently and improperly placed the said pole near to a certain other pole containing a large number of telegraph and telephone wires of the Western Union Telegraph Company and the Bell Telephone Company of Buffalo, which said last-mentioned pole and wires were lawfully placed in their position; and the defendant had negligently and improperly strung its electric light wires upon its said line of poles, and had negligently failed to keep and maintain the same in proper condition so that the said electric light wires were immediately under the said telegraph and telephone wires, and one of the said electric light wires came in contact with a certain iron brace on the pole supporting the said telegraph and telephone wires and forming a part of the structure designed to hold up the said wires, and that by reason of the said electric light wire coming in contact with the said iron brace and rubbing against the same, the protecting and insulating material was rubbed off from the said electric light wire so that the said iron brace became heavily charged with electricity, all of which was due to the faulty and negligent construction and maintenance of the said pole and line of the defendant company."

The deceased was in the employ of the Western Union Telegraph Company as a lineman, and it became his duty to "lay out, construct, and repair lines of telegraph wires on the poles of the said Western Union Telegraph Company;" and it is averred that on that day he was directed by his employer to repair certain telegraph wire on the said William street line of said company. It is further averred that "for the purpose of repairing said wire he was obliged to and did climb the pole of the Western Union Telegraph Company located at the north-westerly corner of William street . . . standing near the pole of the defendant . . . that while the said Michael Dwyer was climbing the said pole lawfully and in the performance of his duty, and in the exercise of due care and caution, he grasped or came in contact with the said iron brace upon said

pole, which was in contact with the electric light wire of the defendant . . . and was heavily charged with electricity therefrom, without any knowledge or notice or means of ascertaining that said brace was in such a condition or that the said brace was in any way dangerous, and by reason of touching the said brace he received a shock of electricity which caused him, without any fault or negligence on his part, to fall from his position to the ground, and that he was then and there killed and died."

The answer of the defendant admits its incorporation, and "that the defendant is engaged in the transmission of electricity for sale and for general lighting, and for other purposes in and throughout the city of Buffalo . . . which electricity is transmitted through metallic wires suspended upon poles which are generally placed upon and along the streets of said city; that the said wires are covered with a protecting or insulating material;" and that the defendant "had erected a pole to carry its said electric wires."

The answer contained denials of certain allegations in the complaint, and alleged "that the injuries to the plaintiff's intestate, as set forth in the complaint, were caused wholly through the fault or negligence of plaintiff's intestate, or some person or persons to this defendant unknown."

From the evidence it appears that the deceased was sent out on the morning of August twenty-third to remedy some trouble that had been reported on the line of a telegraph wire of the Western Union, running along William street and crossing the railroad tracks. At about ten o'clock in the morning he climbed, by means of iron spurs fastened on the inside of his ankles, the telegraph pole belonging to the Western Union Company while in the performance of his duty. After reaching a point at the upper end of the pole where he could reach the last crossarm on the telegraph pole, which was some twenty-eight feet from the ground, he reached up with his left hand apparently with a view to grasp the crossarm or the iron brace under it. He then

suddenly threw up both hands and fell over backwards in a circle, his feet clinging to the telegraph pole by the spurs until he had about completed his revolution, when he fell head foremost to the stone pavement at the foot of the telegraph pole, a few feet near to it, dead.

Several witnesses were produced by the plaintiff who described the circumstances attending the deceased's climbing the pole and the manner in which he fell. The witnesses are in substantial accord in the narration of the observations made by them of the deceased from the time he commenced to ascend the pole until he descended.

Upon the other hand, the defendant called as a witness one Donovan, who describes the observations that he made attending the deceased's movements up the pole and down again, in many respects in conflict with the evidence produced by the plaintiff.

The evidence offered by the plaintiff tended to establish the fact that when the deceased had climbed up the pole he put one of his hands on the pole and reached the iron brace which supported the lower crossarm of the Western Union pole, and that instantly, upon his hand coming in contact with the brace, he received a sudden shock of electricity which caused him to throw up his arms and let go of the pole and to fall to the ground.

Upon all the evidence detailed in respect to the circumstances of his fall, it may be said there is room for some doubt whether he was instantly killed by the shock of electricity, or whether the shock of electricity was the cause of his death, or whether that caused him to let go the grasp of the brace fastenings and to fall to the ground, and that his death ensued from the injuries which he received—the breaking of his backbone and the injuries to his skull; and it may be said that a fair question of fact was presented to the jury to determine whether the proximate cause of his death was the shock of electricity which he received, or the injuries which he sustained by reason of the fall.

The evidence tends to show that, supporting the Western Union wires was a V-shaped brace placed there to strengthen the

crossarm. It consisted of two iron bars bolted together at the bottom by a single bolt and fastened into the telegraph pole some eighteen inches below the crossarm and extending from the pole out to the crossarm at an angle of about forty-five degrees.

The evidence indicates that the telegraph pole was erected and the crossarms placed thereon, and the wires of that company placed there in March, 1894, and that subsequently the defendant, under a grant of authority from the common council of the city of Buffalo and in accordance with law, placed its line of poles, wires and lights along William street, being lawfully in the street under a grant from the common council.

It appears that there were before the jury two braces and two bolts similar to those on the Western Union pole, and there was evidence tending to indicate that one of defendant's electric light wires was in contact with the iron brace, and that the wire, by constant friction caused by rubbing against the iron brace, had lost its insulating cover to such an extent that the copper wire came in direct contact with the iron brace.

There was some evidence tending to indicate that the wire of the defendant touched two of the braces, and to the effect that the one where the abrasion of the insulation was the greatest was the westerly one.

The evidence tends to indicate that the electric light wire was charged with electricity, carrying at that time about 1,100 volts, which, according to the witnesses, is sufficient to give a deadly shock and cause instant death to any one receiving the full force thereof.

In addition to the circumstances disclosed by the witnesses who saw the accident, the plaintiff produced at the trial four photographs of the pole in question and its immediate surroundings, and gave evidence in connection therewith as to the manner in which they were taken and as to the circumstances disclosed in the presence of the witnesses that were engaged in taking the photographs and observing the situation at the time they

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were taken. The photographs were taken, however, on the twenty-ninth of August, six days after the accident.

The witness Devlin, who superintended the taking of the photographs, testified that he had climbed the pole about an hour after the accident, and that there had been no change in the situation or condition of the pole or the wires in the interval of the six days. No evidence was produced tending to show there had been any change in the condition during the period intervening between the death and the taking of the photographs.

Apparently the electric light pole stood only about three feet distant from the telegraph pole at the bottom, and the distance between the two was not over five feet in the region of the wires. At the time the photographs were taken, according to the testimony of Hanks, he climbed a pole carrying with him a piece of insulated wire, one end of which had been stripped down to the metal and attached to the iron trolley pole so as to form a metallic circuit for electricity to the ground; that he put the exposed end of the wire which he held in his hand near to the iron brace, and when the contact was made with the iron brace it produced a flash of light occasioned by a discharge of electricity from the brace into the wire, and through the wire into the trolley pole and into the ground. According to the facts narrated, in addition to those already mentioned, it is insisted in behalf of the plaintiff that it was established that the brace was heavily charged with electricity occasioned by the contact of the electric wire with it.

During the trial it appeared that the Western Union wires contained only about 160 volts on an average, and, according to the testimony given by some of the witnesses, that sometimes went as high as 250, and that the linemen were accustomed to handle the wires of the Western Union Company without gloves, and without receiving any injury or shock, even if they grasped the wires with the naked hand.

It was sought by the plaintiff to establish that it was the electricity from defendant's wire which charged the brace, and

that the electricity found in the brace could only be accounted for by supposing that the wire of the defendant communicated the same to it. Bearing upon that question evidence was given to show that telegraph wires were at a very low amperage and that the electric light wires were at a high amperage. Evidence was given tending to show that voltage relates to the strength and that amperage is the amount of the electric fluid.

The plaintiff called as a witness McNierney, a foreman of the Western Union Telegraph Company, who had charge of the workmen in 1894, and who was acquainted with the pole where the injury was received, and he testified that he had knowledge when the electric light company's pole on the northwest corner of William street was placed there, and he added: "I know that I sent a man to see that they cleared; there was trouble about the electric light men setting their poles; they set them too close and I had to send to have them clear them." This witness says the defendant's poles were set in August, and he adds: "I had some talk with Mr. McGuire, the general foreman, and Dillon, the superintendent and general foreman of the electric light company, about the poles on William street; this pole was not so bad as others. I didn't specially mention it. I had a talk with them about the series of poles on William street, near Central Belt line, of which this pole was one. . . . After the new electric light poles were set they were up close to my crossarms, but not so close they would interfere with my wires, with the exception of one place they raised up my wire on to the crossarm, and that is the first pole east of this pole in question. . . . I had a talk with Mr. Dillon, the general foreman, about this wire, and others. If this electric light wire was only about six inches below the bottom crossarm, it would be about eleven inches from the Western Union wires, which were above the crossarm. The crossarm being four inches wide and the pin above being six inches, the wire would be five to six inches above the top of the crossarm; the crossarm would be about four inches, that would make nine or ten inches, and the electric light

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wire was six inches below that, so it would make the electric light wire something like eleven inches from the nearest Western Union wire. If one of the Western Union wires sagged or broke and came in contact with the electric light wires it would burn out our safety wires and probably our instrument. The electric light wires and our wires run along William street parallel, the electric light wires were right under our wires and run from pole to pole. . . . The electric light wires are insulated. . . . If that insulating material is ripped off the electric light wire and it comes in contact with another piece of metal, that metal becomes charged with electricity if there is any connection with the ground, or with any metal substance going to the ground. In this case if the electric light wire which was strung on this electric light pole to the next pole east, rubbed against the iron brace on the Western Union pole, and the insulating material on the electric light wire was rubbed off, that iron brace would become charged with electricity, and if any person caught hold of that iron brace with his bare hand, and he also in any way made a circuit to the ground, either through another wire that he had in his hand, or in any way, he would receive a heavy shock of electricity in this case. The effect of that shock would be, well, holding that brace, my experience is it would throw him, make him lose his hold, give him a shock. If this iron brace that supported the lower cross arm was not charged with electricity it was a perfectly safe thing to catch hold of. Unless it got charged with electricity from some outside source away from our pole there was no danger in catching hold of that brace. The brace was strong. That was a proper thing to catch hold of up there; it is customary to catch hold of that. It is a proper thing for a man up there examining a wire to see if it is properly insulated, to catch hold of that brace in doing so. I have done that myself. If the brace is charged with electricity from an electric light wire it is not a safe thing to do."

Numerous witnesses testified that a party could not discover

by looking up from the street, whether the electric light wire was in actual contact with the iron brace on the telegraph company's pole, although it could be seen that it was close to the brace. Nor could any one determine that the insulating material had been rubbed off while standing upon the ground.

The witness Devlin, who examined the pole, brace and wires an hour or two after the accident, testified: "I found it touched the Western Union brace on the street side under the last cross-arm; the electric light wire on the pin next to the pole on the street side. There were three electric light wires on that pole, two on one side and one on the other. . . . I did not test the brace at that time or touch it. I should judge that where the brace and wire came in contact would be about five or eight inches below the bottom of the Western Union crossarm. I could not tell until I got up on the pole whether the insulating material that surrounded the electric light wire was rubbed off. When I got close I could see that the insulation was worn off of the electric light wire; it looked like the wire itself was directly in contact with the brace. . . . I looked at the wire and brace in question from the ground; I couldn't see any change from the 23d of August to the time on the 29th when I went to take the picture. I looked to see and there didn't look to be any to me." This witness also testified that he saw the flash when the picture was taken, and he added: "I know what made that flash." When the question was propounded to him, "What made that flash?" it was objected to on the ground that the question called for an opinion and that the witness has not been shown to be competent. The objection was overruled and the defendant took an exception. The witness then added: "The contact of that wire with the brace made the flash." The witness was then asked, "You were asked to explain what made the flash?" and the objection was renewed and an exception taken, and the witness answered: "Touching the wire to the brace made the flash. Q. What did that indicate in regard to the condition of the brace?" The witness answered: "To the best of my recollection that flash was made three or four times."

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We think the question called for an observed fact, and that when the witness described the circumstances under which the contact was made, by means of the wire with the brace, and that as soon as the contact took place that a flash appeared, he stated a fact which we think was competent and the exception to his evidence does not present error.

In *Manke v. People*, 17 Hun, 417, S. C. affd., 78 N. Y. 611, TALCOTT, P. J., said: "The question discussed lies very near the line which divides cases in which opinions are competent to be given in evidence from those which are clearly inadmissible." And he reached the conclusion that the opinion of the witness, formed by a process of reasoning upon the facts known to him, was incompetent, as he was asked whether a piece of alleged wadding fired from a gun had the appearance of wadding fired from a gun and was allowed to express his opinion. We think the case differs from the one in hand.

The case of *Ferguson v. Hubbell*, 97 N. Y. 507, differs from the case here, as there it was held that it was not proper to allow a witness to answer as to when was the proper time to burn a fallow.

It is insisted in behalf of the defendant that the evidence to which we have adverted proves nothing whatever against the defendant, and it is suggested that the intestate lost his balance and fell to the ground, or that in some other way he fell, and that the evidence does not sufficiently indicate that he received any current of electricity sufficient to cause a shock from any wires except his own wires.

The plaintiff called as a witness one Hurlburt, who saw the accident and helped pick up the deceased and carry him into the flag shanty, and the witness stated: "He fell off on the east side; right off backwards; . . . his head went back and his spurs held his feet; his head was towards the west as he fell back. He didn't breathe after I got there. He struck right on the sidewalk, right near the curbstone, right at the foot of the

pole on the side nearest the tracks, just east of the pole on the sidewalk; he had his coil of wire on his right shoulder. . . . I remember some braces on that telegraph pole under the cross-arm. He was near the crossarm, so that if he had put his hand out he could have reached the brace. I think he was within reaching distance of the brace." The witness then added that he looked at his hands after he fell, "and on the left hand there was a little rust; it might have been an inch wide, just marked across the palm of his hand, a mark of rust."

The deceased was taken to the morgue, and the next day an autopsy was held in the presence of the coroner and physicians, and one of the physicians testifies that conditions and circumstances were found which tended to indicate that the deceased received a shock of electricity. In speaking of the hand one of the physicians observed: "It looked as if the hand had come in contact with a wire or brace, and that it had produced a slight hyperaemic condition of the skin on that joint. . . . There was something in the man's condition as I examined it which indicated to me that he had received a more or less severe shock of electricity." This witness gave other facts and circumstances tending to fortify the opinion expressed by him, and he was thoroughly cross-examined, and, to some extent, his utterances were shaken.

Upon this subject the defendant called two other physicians, who gave evidence tending to contradict the testimony offered by the plaintiff relating to the appearance and indications of the deceased, and tending to show that he was not a victim of an electric shock.

After a careful examination of the evidence supporting the theory of the plaintiff, and the evidence of the defendant tending to contradict and to explain, and to overcome the evidence of the plaintiff, we are of opinion that a question of fact was presented to the jury for determination, as to whether the deceased received an electric shock which caused him to fall or which caused his death. We think the questions presented by the evi-

dence in regard to the circumstances of his injuries required the submission of the question of fact in that regard to the jury, and that we ought not to disturb the verdict of the jury so far as it relates to that branch of the case.

We think *Strohm v. N. Y., L. E. & W. R. R. Co.*, 96 N. Y. 305, to which we are referred by the learned counsel for the appellant, differs from the case in hand. In that case a speculative opinion was held not to be admissible which related to consequences which were contingent, speculative, or merely possible as to the future.

The evidence to which we have adverted in the case here related to the condition of the body of the deceased as seen, inspected and disclosed to the physicians making the post mortem examination, and, upon the conflict found in that evidence, we think a question was fairly presented for the consideration of the jury.

Whether the deceased took hold of the brace with his right hand or not may be said to have been a question of some doubt, upon the evidence which was offered at the trial, as it was also a question of fact to determine whether the injuries which he received resulted from clutching the wires of his own company having a voltage of only 160, or whether he received the greater shock from the brace which was in contact with the wire carrying a voltage of 1,100. We think the plaintiff's evidence, as well as the evidence offered by the defense, left those questions in such a condition that it was the duty of the court to submit the same to the jury, and that the trial judge committed no error in refusing to direct a verdict as requested by the defendant.

It is strenuously argued by the learned counsel for the appellant that the deceased could not possibly have fallen from the pole in question because of any shock which he received from defendant's wire, and, in fact, did not receive any such shock, but fell accidentally and while carelessly leaning back too far to carry over the testing wire from the trolley pole to his wire,

or by shock from his own wire, or from the street railway wires on the trolley pole. We are not able to assent to the argument of the learned counsel in that regard, and cannot, therefore, interfere with the verdict upon any conclusions we may form in regard to such aspects of the case. We think the questions properly belonged to the jury.

It is appropriate at this point to recall the fact that the defendant was compelled to concede "that the wire of the defendant's lighting system, which was used for carrying a death-dealing current, was against the brace on the Western Union pole, and that the plaintiff's intestate was in a position where he might have touched the brace," and that the insulation had been worn off; and the facts being before the court upon such questions, we think the court committed no error in taking the verdict of the jury in respect thereto, and that the evidence presented a legitimate question for the jury to determine whether the plaintiff's intestate received a shock from the defendant's wire which caused his death.

In *Clarke v. Nassau Elec. R. Co.*, 6 Am. Electl. Cas. 234, 9 App. Div. 54, it was said: "The fact that the defendant brought electricity into the street for use as a motive power, and the fact that electricity so employed was capable of escaping in such a way as to produce the casualty which actually took place, were sufficient, taken together, to justify the inference that the accident was due to the agency of the defendant, in the absence of proof that it was otherwise caused. The maxim *res ipsa loquitur* is directly applicable."

In *Ennis v. Gray*, 5 Am. Electl. Cas. 825, 87 Hun, 361, it was said: "So here we might ask whether the happening of this accident does not carry with it an imputation of negligence, it being self-evident that if the wires had been properly insulated it would not have occurred, and it being equally clear that, with the exercise of ordinary care, defective insulation could be avoided. . . . The plaintiff assumed the burden of establishing the negligence of the defendant, and in that connection

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presented evidence from which the jury properly could infer that the position and manner of the construction of the wiring and electrical converter were improper, and that in five places the wire was imperfectly insulated, and bore evidence of having been in that condition for some time." *Evans v. Keystone Gas Co.*, 148 N. Y. 113.

Here we have the positive evidence that the wire of the defendant was carrying a large voltage, and the insulation had been worn off where the wire came in contact with the brace of the Western Union Telegraph Company, and we have the fact that the deceased was legitimately in the pursuit of his employment upon the pole of the Western Union, and that while upon the ground the fact was not discoverable by ordinary care and observation that the defendant's wire was in contact with the brace, and that the insulation had been rubbed off to such an extent as to enable the wire to charge the brace, and we think it was legitimately a question of fact for the jury to determine upon the whole volume of evidence that was delivered, whether the deceased received a shock from the brace which had become heavily charged with electricity from the wire of the defendant. We think the evidence was sufficient to warrant the jury in finding that the defendant was negligent in having so left its wire that it might come in contact and lose its insulation and charge the brace. And it was also a question whether the defendant had been negligent in inspecting its wire and properly guarding against its contact with the property of the Western Union. And we think the case falls within the principle laid down in *Clarke v. Nassau Electric R. R. Co.*, *supra*, where it was held "that the evidence amply warranted the inference that the horse was killed by an electric shock received from some source, and that as defendant had brought electricity into the street for use as a motive power, and as electricity so employed was capable of escaping in such a way as to produce the casualty which actually took place, these facts were sufficient to justify the inference that the accident was due to the agency of the defendant in the absence of proof that it was otherwise caused."

In the case at hand it was for the jury to determine whether the accident was caused by other circumstances, such as were disclosed in the large volume of evidence offered by the defendant tending to account for the accident, without its fault or negligence.

After perusing that evidence we are not able to say that the jury has gone wrong, or that the trial judge committed any error in leaving the whole question of defendant's alleged negligence to the jury. Nor do we think the learned trial judge committed any error in submitting to the jury the question as to whether the plaintiff was guilty of contributory negligence. Although it was conceded that the deceased did not wear any gloves, the evidence tended to indicate that none were in use by the employees of the Western Union Telegraph Company, nor was there necessity for their use in the ordinary business in which the deceased was engaged.

Doubtless the deceased supposed that the wires of the defendant had been properly insulated, and in making use of the brace for his aid or protection when holding himself upon the pole with spurs he only pursued the ordinary course pursued by persons of ordinary care and prudence when engaged in such employment. At least the evidence warranted the jury in so finding, and, therefore, we ought not to disturb their verdict in that regard.

Although Aldrich, foreman of the Bell Telephone Company, testified that the company had rules requiring employees to wear gloves working on poles around trolley and electric light wires, and that their men "are supposed to have gloves with them," it was, nevertheless, a question of fact for the jury to determine whether the deceased exercised ordinary care under the circumstances disclosed by the evidence as to his employment as a lineman in the discharge of his duties relating to the Western Union wires. *Gilman v. Boston & M. R. R. Co.*, 47 N. E. Rep. 193.

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The learned trial judge delivered a full and exhaustive charge to the jury, in the course of which he said: "The measure of the defendant's duty, with reference to the erection of this pole and of these lines, was reasonable care and prudence under the circumstances which surrounded the operation. That was the measure of its duty, and if it used that degree of care and prudence which a man, an intelligent man, would ordinarily use in his private business, under the same circumstances, then the duty, so far as the constructing of the poles and the line is concerned, was performed." He then proceeded to say: "Assuming that the pole and wire were carefully and prudently erected at this point, then the duty devolved upon this defendant of afterwards maintaining a reasonable oversight, supervision and inspection, to see that the wires and the pole was kept in a safe and suitable condition, therefore, the claim of the plaintiff is that they failed, entirely failed, according to the evidence in the case, to maintain such oversight and supervision after the pole was erected, and that in consequence of that failure, on the part of the defendant, that the insulation of the wire was worn, and the wire itself came in contact with the brace, and created a condition of things which resulted in this man's death."

He then proceeded to submit carefully the question whether the deceased was guilty of contributory negligence to the jury, and in response to a request that he charge the jury "that there is no evidence sufficient to warrant the jury in finding that when Dwyer received his fall there was any apparent trouble or defect in the defendant's system of wires other than the alleged defect of the wire in contact with the brace on the pole in question," he observed: "There is no direct evidence of it. I do not know there is any." The counsel for the plaintiff then said: "I admit there is no direct evidence, but I think there is inferential evidence." We think the court was not called upon to go any further in its charge, or to restate its response to the requests as made.

Upon the whole case we are of the opinion that the evidence

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warranted the jury in finding that the defendant was guilty of negligence and that the plaintiff was free from contributory negligence, and that the negligence of the defendant was the proximate cause of the death of the intestate, and that the learned trial judge committed no error in refusing the motion for a new trial on the minutes, and we, therefore, affirm the order.

All concur, except FOLLETT, J., not sitting.

Order affirmed, with costs.

NOTE.—See note to *Trenton Pass. Ry. Co. v. Cooper*, ante, p. 446; also note 2 at end of Part III.

SNYDER V. WHEELING ELECTRICAL COMPANY.

West Virginia Supreme Court of Appeals, Nov. 10, 1897.

(43 W. Va. 661.)

ELECTRIC SHOCK FROM FALLEN LIVE WIRE.

In an action for damages for death caused by stepping on a live wire in a street, it was alleged in the declaration that the defendant, operating a plant for the manufacture and sale of electricity and having wires in streets for the conveyance of the same in dangerous currents, was charged with the duty to safely secure its wires, and that the injury was due to its default in the performance of such duty. *Held*, not demurrable.

An allegation, in a pleading, that the electric current entered the body of the victim, *held*, construable by implication as stating that the defendant failed to cut the current from the fallen wire.

No other breach of duty than those above stated being pleaded, *held*, that evidence of defective insulation; of the fact that the wires touched wet posts; of failure to provide persons to repair or implements with which to discern breaks; of the fact that at other places the wires were bare,—*held*, inadmissible.

The doctrine, "*res ipsa loquitur*," *held*, applicable where a wire, charged with a deadly current of electricity, falls from its proper place of eleva-

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tion to the street, and there kills a man lawfully passing along and coming in contact with it.

Judgment on verdict for plaintiff reversed on account of improper refusal of requests to instruct, and inconsistent instructions.

Cases of this series cited in opinion: *Uggle v. West End St. Ry. Co.*, vol. 4, p. 389; *W. U. Tel. Co. v. State*, vol. 6, p. 210; *Haynes v. Raleigh Gas Co.*, vol. 5, p. 264; *Denver Consol. Elec. Co. v. Simpson*, vol. 5, p. 278; *Giraudi v. Elec. Imp. Co.*, vol. 5, p. 318; *Ennis v. Gray*, vol. 5, p. 325.

Appeal by defendant from judgment of Circuit Court of Ohio County.

W. P. Hubbard, for plaintiff in error.

John A. Howard and *Melville D. Post*, for defendant in error.

BRANNON, J.: In an action on the case, Florence Snyder, administratrix of Andrew C. Snyder, recovered a judgment against the Wheeling Electrical Company for \$1,000, and the company obtained this writ of error.

The declaration in this case states that the defendant operated an electric plant for the manufacture and sale of electricity, and had its wires over the streets of the city of Wheeling for the conveyance of electricity in dangerous currents, and that it was the duty of the defendant to exercise all possible care in putting up and operating its plant and wires, and constantly inspecting the wires and other appurtenances and appliances, and in seeing that they were strong, suitable, and safe, and that the wires and appurtenances were at all times safely secured, and to immediately attend to and repair broken or defective wires and appliances, and, when any of the wires were down upon the street, to cut off from them the current of electricity, that the lives and limbs of persons on the streets might not be endangered; yet the defendant carelessly and negligently suffered one of its wires at the corner of Market and Sixteenth streets to be

so insufficiently secured that it came down, and lay on the street, and Snyder stepped upon it, received the electric current, fell prostrated by it, and continued to lie there, and receive the current into his body, and therefrom died. This declaration surely says that it was the duty of the defendant to safely secure the wires, and that, from being insufficiently secured, they came down into the street, and there wrought the injury. This one duty, breach, and injury save the declaration from demurrer. I think, too, the declaration may, by implication, be construed to say, what it should have positively averred, that the defendant failed to cut off the current from the wire when down, as it avers that the current entered Snyder's body, and he fell, and continued to receive it, which could not be so had the current been cut off. "A declaration will be treated as alleging by implication every fact which can be implied from its averments by the most liberal intendment." Hogg, Pl. & Forms, sec. 140. Those were the only two omissions of duty specified. None other could be proven, for, even where there may be allowable a general charge of negligence, yet, if the declaration does give certain specifications of negligence as sources of the injury, others cannot be proven. *Hawker v. Railroad Co.*, 15 W. Va. 629. Therefore evidence was not admissible to prove want of or bad insulation of wires at the place of accident and elsewhere, and that wires came in contact with wet posts, and that nobody was kept on duty to repair broken wires; that on a certain other occasion, when a wire was out of fix, some one telephoned from the plant that there was no one to fix the wires; that no instruments were kept to discover breaks; and that at other places the wires were bare. It might seem that some of this evidence might come in under the allegation of insecure fastening, but it relates more to the condition of the wires, not to their fastening, and there is no allegation of defective wires. The declaration does assign certain duties as imposed on the company, among them the duty to attend to broken wires and to inspect

wires and apparatus, and to see that all wires were strong, safe, and safe; and, if this recital of duties had been followed up with averment that the insulation of the wires was defective and in places the wires bare, coming in contact with wet persons, thus injuring and rendering them unsafe and liable to be injured, or even the general allegation that the wires were unsuitable, weak, and unsafe, in negation of the duty assigned in the recital, and that servants were not kept for inspection, and that care and repair was not made, and that no appliances were kept to prevent the fall of wires, and no means existed for the recovery of their fall, this evidence would have been admissible. But what, in this declaration, gave the defendant warning of this evidence? I think evidence of failure to inspect was admissible as evidence of insecurity of fastening and on principle above stated. It may be said that the evidence that no inspection was kept to tell of a fallen wire ought to come in under the allegation that it was the duty to cut off the current, and that the current continued to flow after the fall of the wire, but that would be going very far. None of this evidence comes in under this declaration but by a liberality too loose,—ignoring the defendant's rights,—some of it, not at all. I hold that the evidence that with certain means of ascertaining the cause of an accident the current could be shut off at once, under the charge that it was the duty to shut it off, and the allegation made by the declaration that it continued after the fall of the wire; and that the current was going pretty far. All this evidence, as a court can readily see, was calculated to and did wield a potent effect in the case, and the error of its admission cannot be looked over as harmless. It was an important factor in the trial.

From these considerations it comes that plaintiff's instruction No. 2 was bad as presenting a theory for recovery which, though made relevant by some evidence, yet there was no warrant for under the declaration. It said that if the defendant failed to have the most reliable and best appliances to discover broken wires, the company, in the absence of contributory negligence,

ligence, was liable. I think No. 3 good under the charge of insecure fastening. I think No. 2 should have said "good, reliable, and efficient" means and appliances, instead of "best and most reliable." *Berns v. Coal Co.*, 27 W. Va. 286, points 9, 10. An instruction for defendants (No. 4), told the jury that the only negligence charged in the declaration was in suffering wires to be so insufficiently secured as to fall, and therefore all evidence and argument as to other suggestions of negligence must be disregarded; yet plaintiff's instructions held the company liable for not only that, but for failure to have the best appliances for discovery of broken wires, and for failure to exercise the highest degree of care in the construction, inspection, and repair of wires and poles; and so the instructions were inconsistent,—one saying to the jury that the case involved only one basis of recovery, others giving several. Which would the jury follow? Likely those giving several. A good instruction does not cure a bad one, but it must be withdrawn. *McKelvey v. Railway Co.*, 35 W. Va. 500, 14 S. E. 261. Inconsistency in instructions is error. *Industrial Co. v. Schultz*, 43 W. Va. 470, 27 S. E. 255. I think as Dr. Walden had examined the dead body of Snyder in his effort to resuscitate life, he could give his opinion as to the cause of his death. His opinion, however, should be confined to his knowledge based on that examination; but the court allowed him to state his opinion, not only on that, but also from what he could learn,—that is, hearsay. I think it is inadmissible to ask him whether there was any indication of death from any other cause than electricity, so as to negative any other death-producing cause.

I come next to an important question. Suppose there is no evidence of negligence on the part of the defendant, does the mere fact that the wire fell create a *prima facie* presumption of negligence, sufficient, in the absence of something appearing in the case to repel that presumption, to support the action? This involves the rule or principle of *res ipsa loquitur*,—the thing itself speaks. A wire charged with a deadly current of elec-

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tricity falls from its proper place of elevation above the street to the surface of the street, and there, by contact with a lawfully passing along the highway, kills him with its current. Are we to presume that its fall came from some negligence of the owner, unless the circumstances of the case or facts shown by him shall show that its fall is not attributable to his negligence, but from some defect which that reasonable care and diligence proper in the case of such deadly wire was unable to discover, or some accident beyond his control; in other words, that it was an inevitable accident; I answer that the law raises a *prima facie* case of negligence. As stated in that great work, 16 Am. & Enc. Law, p. 448: "As a rule, negligence is not presumed. But there are cases where the maxim '*Res ipsa loquitur*' is directly applicable, and from the thing done or omitted negligence or care is presumed." The rule cannot be better stated in its generality, than as given in *Scott v. Dock Co.* (1865) Hurl. & C. 596: "There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen if they who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care." In those words it is approved in 1895 in *Shafer v. Lacock*, 168 Pa. St. 497, 32 P. 44, a case where two workmen were repairing a roof, having a fire pot, and from it a fire resulted, destroying the house. "When the physical facts of an accident themselves create a reasonable probability that it resulted from negligence, the physical facts themselves are evidential, and furnish what the law terms evidence of negligence, in conformity with the maxim '*Res ipsa loquitur*,'" is the apt language in which the principle is stated in *Seybolt v. Railroad Co.*, 95 N. Y. 562. One man hurt from the works or property of another, when, from the nature of the case, he would not likely have been hurt without negligence of that other. May he not ask of that other an

planation, or, on his failure to give it, then damages for his injury? Take the case where one, in passing along a street, is hurt by a barrel falling from a door above, or by a brick falling from a wall or scaffold, or by a falling shutter or wall, or the like. The mere occurrences in themselves import negligence. Especially take the cases where things of great danger are used in public highways, where multitudes constantly and lawfully pass, their very nature requiring the highest degree and constancy of care, and one is killed from its being out of place or defective, why may we not logically and fairly assume negligence, unless other plausible explanation appears? The latest work on Torts (2 Jagg. Torts, p. 864), says: "A live wire, however, is exceedingly dangerous, so that proof of contact herewith, and consequent damages, makes it a complete case of *prima facie* negligence, and throws the burden on the defendant to show that such wire was in the street without fault on his part. Generally, companies using electricity on lines along a street are charged with the highest degree of care, having due reference to existing knowledge in the construction, inspection, and repair of their wires and poles, and in the use of devices to guard against harm." This doctrine needs no further discussion from me. It is well sustained by American and English authority. 16 Am. & Eng. Enc. Law, 449, and notes; 2 Jagg. Torts, 938; Whart. Neg. sec. 421; Cooley, Torts, 799; Bigelow, Torts, 596; Shear. & R. Neg. sec. 60; full note 6 Am. St. Rep. 530,—a building falling into street; *Mulcairns v. City of Janesville*, 67 Wis. 24, 29 N. W. 904,—wall of a cistern falling; *Dixon v. Pluns*, 33 Pac. 268, 98 Cal. 384,—chisel falling from scaffold; *Houston v. Brush*, 66 Vt. 331, 29 Atl. 380,—injury from being struck by a wheel from a tackle-block attached to a derrick; note in *Railroad Co. v. Anderson* (Md.), 20 Am. St. Rep. p. 493 (s. c. 20 Atl. 2); *Thomas v. Telegraph Co.*, 100 Mass. 156,—telegraph wire swinging over a street too low, so as to obstruct travel; *Clare v. Bank*, 1 Sweeney, 539,—injury from plank falling from one's premises;

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Howser v. Railroad Co. (Md.), 30 Atl. 906,—cross-tie fall from a moving car; *Uggla v. Railway Co.* (Mass.), 4 Am. El. Cas. 389, 35 N. E. 1126; *Morris v. Strobel & Wilken Co.* Hun, 1, 30 N. Y. Supp. 571,—sign board falling in street. It is clear that this doctrine applies in cases where a passenger is injured by the negligence of a railroad, or other conveyance of a common carrier, in injury there existing in such cases a presumption of negligence against the carrier, because there is an implied contract to safely convey; but it is not confined to such cases. 20 Am. St. Rep. 4. *Rose v. Transportation Co.*, 11 Fed. 438. There it is said that though the presumption is more frequently applied in such cases, yet there is no foundation in authority or reason for its limitation, as the presumption originates from the nature of the act, not from the relation of the parties, and is indulged withal, ever, as a legitimate inference, the occurrence is such as to follow the ordinary course of things, does not take place when proper care is exercised. This doctrine has been applied to those using electricity in streets. *W. U. Tel. Co. v. State* (Md.), 6 Am. Electl. Cas. 210, 33 Atl. 763; *Haynes v. Gas Co.* (Ct.), 5 Am. Electl. Cas. 264, 19 S. E. 344. Public policy, and sheer necessity, must require of a person or corporation using the current of electricity in high tension along highways a high, if not the highest, degree of care, and this high degree would seem all the more reasonable to justify this rule of presumptive negligence in such cases. The degree of care is high, the nature of the case being high, and there being little danger that such care be exercised, if accident happen, there is afforded a high probability of the absence of that care. This high degree of care is exacted of operators of electricity by the cases just cited. *Electric Co. v. Simpson*, 5 Am. Electl. Cas. 278, 21 N. E. 371, 41 Pac. 499; *Giraudi v. Improvement Co.*, 5 Am. Electl. Cas. 318, 107 Cal. 120, 40 Pac. 108; *Ennis v. Gray*, 5 Am. Electl. Cas. 325, 87 Hun, 355, 34 N. Y. Supp. 379. *Code of Electricity*, sec. 249, says that the mere fact that an electric wire sags or falls, if unexplained, is sufficient proof *prima facie*

of negligence. But juries must understand that this presumption is by no means final or conclusive. Uniformly careful, prudent management commensurate with the dangerous character of the works, adequate to the safety of the public, in the absence of specific neglect connected with the accident, will repel such presumption. We must not forget that misfortunes do occur from inevitable accident. A wire may have some defect which the most astute care will not discern. A wire originally good may come to be defective, and break, when no human skill could detect its defect. Time and wear deteriorate man and all the means and instruments he uses to gain a living. Paralysis and failure may come upon them at any moment. Whether there is culpable blame is a question for a fair-minded jury under all the circumstances.

It follows from what I have said that the court properly refused to exclude the plaintiff's evidence, as it tended in an appreciable degree to sustain the case, so as to make it proper to go to a jury. So I may say as to the defense of contributory negligence. *Carrico v. Railway Co.*, 35 W. Va. 389, point 3, 14 S. E. 12; *Yeager v. City of Bluefield*, 40 W. Va. 484, 21 S. E. 752. And the defense waived the motion to exclude by going on with its evidence. *Robinson v. Welty*, 40 W. Va. 385, 22 S. E. 73; *Core v. Railroad Co.*, 38 W. Va. 456, 18 S. E. 596. And it follows from the views above given that the court did not err in refusing to give defendant's instruction No. 2, that the mere fact that Snyder was injured raised no presumption of negligence against the defendant. In an instruction in lieu of it the jury was told that the mere fact of injury raised no presumption of negligence, unless the proof establishing the injury showed circumstances from which some negligence or want of care may be attributed to the defendant. This was error against plaintiff, because it negatived the rule that the fall of the wire and injury afforded a *prima facie* case of negligence, and was beneficial to the defendant. Defendant asked instruction 9, saying that, if the wire where the accident occur-

red was defective, and the injury resulted from that defect that raised no presumption of negligence, and the plaintiff could not recover unless he proved by a preponderance of evidence, in addition to these facts, that the defect occurred through the negligent act or default of the defendant. This instruction is bad. Granting a defect in the wire killing the deceased, *prima facie* case for recovery is made. Defendant asked and was refused instruction No. 10: "Where an event takes place the real cause of which cannot be traced, or is at least not apparent, it ordinarily belongs to that class of occurrences designated as purely accidental. and, there being no presumption of negligence in such cases, the party who asserts negligence cannot recover without showing enough to exclude the case from that class of accidental occurrences." In *Railway Co. v. Locke*, 112 Ind. 412, 14 N. E. 391, cited to support this instruction, it is admitted, I think, that in cases where a presumption of negligence arises, the principle of this instruction does not apply. The instruction is bad as applied to this case in view of the rule above stated of a presumption of negligence from this occurrence. Defendant was refused instruction No. 11: "Where the circumstances of an accident indicate that it may have been unavoidable notwithstanding reasonable and proper care, the plaintiff charging negligence cannot recover without showing that the defendant has violated a duty incumbent upon it from which the injury followed in natural sequence." I think this instruction proper, in view of the defendant's evidence as to good management, and evidence by witnesses on both sides that electric wires sometimes break from causes impossible to discover. Of course, though the *prima facie* presumption of negligence from the broken wire exists yet it is subject to be met by any and all circumstances, features and evidence in the case tending to give the misfortune a cause not springing from the company's fault, but purely from an accident, which no reasonable human care could prevent, a hidden defect in the wire, electrolysis rendering it suddenly weak, or

whatever cause. This instruction presented the question to the jury on the whole breadth and aspect of the case, whether the misfortune came from unavoidable accident; and it seems to me that, when the circumstances do indicate unavoidable accident as the cause, it ought to be shown or appear that it was not. Why was not the defendant entitled to this instruction? I think instruction No. 12 asked by defendant was improperly refused. *Railway Co. v. Locke*, 112 Ind. 404, 14 N. E. 391. "(12) The defendant, in erecting and maintaining its wires, was only bound to anticipate such combinations of circumstances and accidents and injuries therefrom as it may reasonably forecast as likely to happen, taking into account its own past experience and the experience and practice of others in similar situations, together with what is inherently probable in the condition of the wires as they relate to the conduct of its business." As the case is to be retried, I shall not discuss the merits on the evidence as to the liability or nonliability of the defendant, either with or without reference to contributory negligence, as the evidence may not be the same on a second trial, and, if not, this court ought not to express an opinion on part of the evidence. We will therefore reverse the judgment, grant a new trial, and remand.

NOTE.—See note to *Trenton Pass. Ry. Co. v. Cooper*, ante, p. 446; also note 2 at end of Part III.

EMILY E. TURTON v. POWELTON ELECTRIC COMPANY AND
POSTAL TELEGRAPH CABLE COMPANY.

Pennsylvania Supreme Court, April 11, 1898.

(185 Pa. 406.)

INJURY FROM ELECTRIC SHOCK—NEGLIGENCE.

It is for the jury to say whether an electric light company was negligent in allowing the insulation of one of its wires to become so worn that

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electricity was transmitted to a guy wire and a person coming in contact with the guy wire was injured.

Appeal by defendant Powelton Electric Company from judgment of Court of Common Pleas of Philadelphia County, entered upon the verdict of a jury for the plaintiff.

John K. Andre and Henry F. Walton, for appellant.

Alex. Simpson, Jr., for appellee.

STERRETT, C. J.: This action, against the Powelton Electric Company, appellant, and the Postal Telegraph Cable Company, as joint tort feasons, was brought to recover damages for personal injuries to the plaintiff alleged to have been caused by an electric current negligently brought in contact with her person by one or both of the defendant companies. When the testimony was all introduced, the learned trial judge directed a verdict in favor of the Postal Telegraph Cable Company, and submitted to the jury the question of appellant company's liability under all the evidence. His action in thus directing a verdict in favor of one of the defendants has been assigned for error; but inasmuch as joint tort feasons are jointly and severally liable for injuries caused by their torts, and, as between themselves, no right of contribution exists, the appellant company has no standing to complain of the action of the court in directing a verdict in favor of its co-defendant. Independently of that, however, the action complained of was clearly right, and the fourth specification of error is dismissed.

The refusal of the court to give binding instructions in favor of appellant company is also assigned as error. It is wholly unnecessary to review the testimony in detail, for the purpose of showing how unfounded this complaint is, and what manifest error it would have been to have granted the request. In view of the undisputed evidence, it could not be seriously questioned that plaintiff's injuries resulted from an electric shock received

from a guy wire running from a pole in the street across plaintiff's yard to an attachment in the wall of a neighboring property. While it was shown that numerous telegraph and other wires were strung upon the same pole, the evidence tended strongly to prove that the current which caused plaintiff's injury came from the electric light company's wire. It was testified that the voltage or pressure from the other wires was not sufficient to have caused such an injury. It was also clearly shown that the insulation of appellant company's wire, in close proximity to the guy wire, was worn off by contact with the latter, and that flames and sparks had been seen at this point for months before the accident. This and much other evidence of a similar character not only required submission of the case to the jury, but it is also a complete answer to appellant company's contention that it had no notice of the defective and dangerous condition of its wire. It was clearly shown that the wire had been in such a defective condition so long prior to the accident that it was impossible to escape the conclusion that the company knew, or at least ought to have known, the fact.

The case was fairly submitted to the jury, with well-guarded instructions, not only as to the primary liability for the injury, but also as to the amount of damages. As to the former, the learned trial judge charged: "It is contended here by the plaintiff that this wire became worn, and the electricity ran down the other wire, and produced the effect described. You have heard what has been said by the other side against that theory, and it is for you to say, after considering the testimony, whether you think that has been established,—whether that was the cause of the accident. If you should think that was the cause of the accident, then the second question would be, has this electric light company been guilty of negligence which caused the accident? Negligence, as its definition was given to you by the counsel for plaintiff, is the absence of proper care under the circumstances of the case. Every man understands that care

which is sufficient for a barrel of potatoes is negligence with a barrel of gunpowder. (This wire is admittedly a dangerous wire. It is insulated for that, among other reasons. And the question is whether you consider that putting a wire of that kind on a pole already covered with other wires, and going through the city of Philadelphia, is not a very dangerous thing, of itself.) The question for you to decide is, do you think that this company took such care and supervision of this wire, under the circumstances, as, considering its dangerous nature, they should have done? If you think they did everything they ought to do to protect the public and everybody else, they would not be guilty of negligence. If you think they did not, they would be." That part of the above quotation inclosed in brackets constitutes the fifth specification of error. When considered in connection with its context, this excerpt is obviously free from error. As explained by the court, the question of defendant company's negligence depended upon the proper degree of care under the circumstances. As the degree of care increased with dangerousness of the material and appliances with which the defendant was dealing, it was a most pertinent question to consider the character of the circumstances. In the sentence immediately following the one assigned for error the learned judge carefully submitted the question to the jury for their consideration. The company appellant has no just reason to complain that the question was thus submitted. Its rights were carefully guarded, and the controlling questions of fact were fairly submitted to the jury, with instructions which appear to be adequate and free from substantial error.

On the question of contributory negligence, it is sufficient to say there was no evidence to bring home to the plaintiff a knowledge of the dangerous character of the guy wire. There was therefore nothing to justify submission of that question to the jury, and defendant's request was rightly refused.

This disposes of all questions that require consideration. The verdict was fully warranted by the evidence, and we find noth-

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ing in the record that would justify us in reversing the judgment entered thereon.

Judgment affirmed.

NOTE.—See note 2 at end of Part III.

PERHAM V. PORTLAND ELECTRIC COMPANY.

Oregon Supreme Court, April 18, 1898.

(33 Or. 451.)

INJURY FROM ELECTRIC SHOCK—NEGLIGENCE.

The care demanded of electric companies must be commensurate with the danger, and, where their wires are carrying a highly dangerous current of electricity, the law imposes upon the company the utmost degree of care in their construction, inspection and repair, so as to keep them harmless at places where persons are liable to come in contact with them; and whether such care has been exercised in a given case is ordinarily for the jury.

Thus, where an electric light company had, by permission, strung its wires across the top of a bridge belonging to a railway company and the wires were apparently but not actually perfectly insulated and were not placed so that servants of the railway company could not come in contact with them, and the electric light company had not informed the railway company that it was dangerous to touch the wires, held, that the electric light company was liable for the death of an employe of the railway company who was repairing the bridge and in ignorance of the danger of his act on account of the apparent perfect insulation touched two wires at once and was instantly killed.

Cases of this series cited in opinion: *Clements v. La. Elec. L. Co.*, vol. 4, p. 381; *Giraudi v. Elec. Imp. Co.*, vol. 5, p. 318; *Ennis v. Gray*, vol. 5, p. 325; *McLaughlin v. Louisville Elec. L. Co.*, vol. 6, p. 255; *Illingsworth v. Boston Elec. L. Co.*, vol. 5, p. 312; *Griffin v. United Elec. L. Co.*, vol. 6, p. 252; *Flood v. W. U. Tel. Co.*, vol. 4, p. 402; *Hector v. Boston Elec. L. Co.*, vol. 5, p. 300; *McMullen v. Edison Elec. Illum. Co.*, vol. 5, p. 332; *Haynes v. Raleigh Gas. Co.*, vol. 5, p. 264; *City Elec. St. Ry. Co. v. Conery*, vol. 6, p. 217.

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Appeal by defendant from judgment of Circuit Court, Multnomah County, entered upon the verdict of a jury. Action brought by W. T. Perham, as administrator of the estate of N. C. Perham, deceased, against the Portland General Electric Company.

Frederick V. Holman, Richard Williams and Emmet V. Williams, for appellant.

Harry Wildey Hogue, William Wallace Thayer and Sanderson Reed, for respondent.

BEAN, J.: This action is brought under section 371 of Hill's Am. Laws, to recover damages for the death of plaintiff's intestate, caused by the alleged negligence of the defendant company. The facts, which are practically undisputed, are that on September 27, 1893, the plaintiff's intestate, an employee of the East-Side Railway Company, a corporation owning and operating a suburban railway between Portland and Oregon City, was killed while engaged in repairing its bridge across the Clackamas river, by coming in contact with wires owned and used by the defendant company for the transmission of electricity from its station in Oregon City to its customers in the city of Portland, and which were suspended over and horizontally with such bridge. This bridge is described by the witnesses as a Howe truss with half-hip connections, 22 feet wide, and the distance between the top and bottom chords is 35 feet. Near the ends of each top chord are four vertical iron rods with nuts and washers, connecting the top and bottom chords, and the top chords are connected together by 6x8 lateral braces, set on edge crossing each other in the shape of the letter X, and also by iron rods, about an inch in diameter, at either extremity. The main end braces of the bridge run from the ends of the top chords to the outer end of the bottom chord at an angle of 45 degrees, are connected together by cross braces similar to the top lateral braces, and also by two timber 5½ by 9½ inches, called "strut braces," placed horizontally above

and below the cross braces. The upper strut brace is $4\frac{1}{2}$ inches below the under side of the top chord, or $20\frac{1}{2}$ inches below the upper surface thereof, and the most southerly lateral rod connecting the top chords of the bridge is 22 inches north thereof, and 13 inches higher than its upper surface. Under a license from the railway company, the defendant had, at the time of the accident, 10 wires strung lengthwise and 35 inches above the top of the bridge, which were attached to pins in cross braces or arms extending from one side of the bridge to the other, and supported by standards resting on the top chords. The wires were placed one foot apart, except the two on the west side, between which there was a space of two feet. On the 15th of September, 1893, the railway company sent a gang of men, under charge of a foreman, to repair the bridge, and they were engaged in such work until some time in the following month. While thus engaged, it became necessary to tighten the nuts on the vertical rods connecting the top and bottom chords, and, as this could not be done on the south end of the bridge without moving the arm or brace to which the electric wires were attached, the foreman telephoned, on the morning of the 27th of September, to the office of the railway company in Portland, asking that a lineman be sent out to detach the wires, so that the arm could be moved, but, as the company neglected to do so, he concluded to go on with the work, and do the best he could. He thereupon directed the deceased and three other workmen to go up on top of the bridge, and tighten the nuts on the rods with a large wheel wrench 7 feet and 8 inches in diameter. The wheel part of this wrench was some 15 or 16 inches above the socket which fitted on the nut, and the wrench was operated by workmen sitting outside of the wheel on the chords or braces of the bridge, or boards placed thereon. Before working in and among the wires, the workmen examined them, and, finding that they were covered with the insulating material in common use, and that such covering was unbroken, and apparently in good condition, and receiving no injurious effect from handling them,

concluded that they were safe. At the time this examination was made, the wires were what are called "dead wires," as electric current was shut off about 8 o'clock in the morning, not turned on again until about 4 in the afternoon; but of fact the workmen were ignorant, and they supposed and believed that the wires were live wires all the time, and that reason they were harmless was because of the insulation. All in the afternoon, the deceased and his fellow workmen, having completed the work at the north end of the bridge, proceeded to the south end for the purpose of tightening the rods on that end, but, being unable to place the wheel wrench on the nuts because of the standard which supported the cross bar to which the wires of the defendant company were attached, they were directed by the foreman to move it out of the way. At this time the wires on the west side of the bridge were live wires, but this was unknown to the workmen. They proceeded to detach a sufficient number of the wires, beginning at the east side of the bridge, to enable them to move the east end of the south standard or support a sufficient distance north to permit the use of the wheel wrench, and, after taking out the lag screws, which fastened the standard to the top chord, the deceased was directed by the foreman to cross over to the west side of the bridge, to take a hand line and draw up the tools necessary to be used in fastening the standard out of the way of the wrench. In obedience to this order, he started to walk over on one of the top lateral braces, stepping over the wires and steadying himself by touching them with his hands, and when he reached the two live wires, which were carrying at the time 5,000 volts of electric current, he accidentally took hold of both wires at the same time, and the entire force of the current passed through his body, killing him instantly.

The complaint alleges: That at the time the defendant company placed its wires over the bridge of the railway company it knew it would be necessary from time to time for such company to cause the bridge to be repaired, and for persons to work u

the top chords and braces thereof; but, notwithstanding such knowledge, it carelessly and negligently strung its wires only 2½ feet above such chords and braces, and in such a manner that it was not possible or practicable for persons to work upon such bridge without coming in contact with and handling the same; and that it carelessly and negligently failed and omitted to protect or cover the wires, and particularly the two west ones, with safe or sufficient insulating material, and that it carelessly and negligently permitted the covering used thereon to become worn, defective, and wholly insufficient to render them safe to persons coming in contact therewith. That it knew the bridge was being repaired during all the times referred to, and particularly on the 27th day of September, and that it might be necessary at any time between the hours of 7 o'clock in the morning and 5:30 o'clock in the afternoon of that day for the workmen to move about among and come in contact with its wires, and that it was not possible or practicable for them, nor for any one, to go upon or work upon the top chords or the top lateral braces without so doing, and that it also knew that the deceased was engaged in the work of tightening the vertical rods during the afternoon of the 27th, and that he was necessarily moving about among and coming in contact with and handling the wires, but that, notwithstanding such facts, it carelessly and negligently caused and permitted a high and dangerous current of electricity to be turned into the two wires nearest the west side of the bridge at about 4:20 o'clock in the afternoon, without notice or knowledge to the deceased or any of his fellow workmen; and that the deceased, while engaged in the performance of his duties and exercising due care and caution, and without any fault on his part, came in contact with said wires, and was instantly killed. That all the workmen on the bridge, including the deceased and foreman, thought and believed it was perfectly safe for them to move about among and touch and handle the wires referred to, because the same seemed to be insulated, but

they had no knowledge of the time the current was turned on the wires, but thought and believed they were charged with electricity and were live wires at all times. The complaint prays for judgment against defendant for the sum of \$500, being the limit of a recovery permitted by the statute. The defendant, by its answer, admits that at the time it placed the wires on and along the bridge in question it knew that it would be necessary to repair the bridge from time to time, and that in doing so persons would be required to go and be upon the top chords and top lateral braces thereof, but it denies that its wires were so placed that it would be necessary for such persons to come in contact therewith, or move about among or handle the same, or that it failed or omitted to protect or cover its wires with proper or sufficient insulating material, or that it failed to maintain the covering used to become worn or defective. It alleges that it is impracticable to insulate wires carrying such high voltage as was carried over the wires in question so that they will not be dangerous to the life of persons coming in contact with two of them at the same time; that all of its wires were attached by proper and sufficient glass insulators to the cross bars or arms at a height of not less than 2 feet and 6 inches above the top chords and top lateral braces of the bridge and were new and perfect wires, and the insulating material was in perfect order and condition. It is further alleged that the deceased was guilty of contributory negligence in attempting to step over the wires in crossing the bridge, but that he should have passed under them either by creeping along on top of the lateral braces or by crossing on the strut brace at the south end of the bridge which was about 4½ feet below the wires. The reply put in issue the material allegations of the answer. After a trial resulting in a verdict and judgment in favor of the plaintiff, the defendant appeals, alleging as error: First, that the complaint does not state facts sufficient to constitute a cause of action; second, that the court erred in overruling its motion.

a nonsuit; and, third, that the court erred in the giving and refusal of certain instructions to the jury.

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[The portion of the opinion omitted relates to right of action in personal representatives of person killed by alleged negligence.]

This brings us to the important question whether the defendant's motion for a nonsuit should have been sustained. It is undisputed that the wires which caused the death of plaintiff's intestate were placed by the defendant in a position where they would probably be exposed to contact by persons working on the bridge, although it knew that it would be necessary to repair the structure from time to time; and it admits and alleges that it is not practicable, in the present knowledge of the science of electricity, to insulate wires so as to make them safe, and not dangerous to persons coming in contact with them when charged with the high voltage of electricity carried over the wires in question. This is, in our opinion, sufficient to make out a *prima facie* case of negligence, because it tends to support the main ground of recovery relied on by the plaintiff, viz.: that, although the defendant knew it would be necessary from time to time for the railway company to send men on top of the bridge to make needed repairs, it placed its wires to be used in the transmission of such a high voltage of electricity as inevitably to cause the instant death of any person coming in contact with two of them at the same time in such a position that it was impracticable, if not impossible, to make such repairs without doing so.

It is contended, however, that the deceased was guilty of contributory negligence (1) in going on top of the bridge to work without ascertaining from the defendant company, or some one having knowledge on the subject, whether it would be safe to come in contact with the defendant's wires; and (2) in attempting at the time of the accident to cross from one side of the bridge to the other by walking on the top lateral braces and stepping over the wires, rather than crossing on the end strut

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brace and under the wires. But both of these contentions proceed on the theory that he was chargeable with knowledge of the fact that the wires were dangerous, and, having voluntarily exposed himself to the risk of contact therewith, must take the consequences of his own conduct. And, indeed, this is the underlying question on this branch of the case. The deceased was unquestionably guilty of such negligence as will preclude a recovery if he is to be charged with knowledge that the defendant's wires, although apparently harmless, were in fact dangerous; for he could have avoided coming in contact with them. But, on the other hand, it cannot be ruled as matter of law that he was negligent in going on the bridge to work on the crossing on the top lateral braces, if the defendant owed to him the duty of exercising reasonable care to prevent injury to him from contact with its wires while at his work. There is evidence tending to show that he acted with due care and caution, and did not heedlessly or recklessly expose himself to contact with the wires. It was only after they had been examined and their apparent safety ascertained, that he and his fellow workmen ventured to work at a place where they would probably come in contact with the wires; and there is evidence to the effect that the usual and customary way for men employed in the construction or repair of a bridge of the character in question to cross from one top chord to the other is by walking on one of the top lateral braces. Unless, therefore, the court should have been withdrawn from the jury on the ground that the deceased was bound, at his peril, to ascertain whether the wires were in fact dangerous before working at a place on the bridge where he would be likely to come in contact with them, there was no error in denying the motion for nonsuit, and in submitting the issue of negligence as respects the defendant to the plaintiff to the jury; and we do not think any such doctrine as the one suggested can be maintained either upon reason or authority. It is not claimed that the deceased had any more knowledge of electricity or its effects than such as is possessed

by persons of average intelligence. He knew that there is such a force carried by wires and used in driving cars and lighting streets and houses, and that the wires in question were used for that purpose; but he supposed, as is the common understanding, that the insulating material with which such wires are covered is placed there for the purpose and with the result of making them safe. He had no knowledge of the fact, as this record discloses, that wires are used for the transmission of electricity, which, on account of the high voltage carried, cannot be insulated at any reasonable cost so as to make them safe, and that the insulating material sometimes used thereon affords no protection from injury. Nothing can, therefore, be claimed in this case on account of any special knowledge of electricity or its effect possessed by the deceased; and there is no pretense that he knew the wires were in fact dangerous, and, as he was not the agent or servant of the defendant company, he was not, in our opinion, chargeable with such knowledge, nor did he assume any risk on account of the wires unless he knew the danger and voluntarily exposed himself to it. He was not a trespasser or licensee bound to take the premises in the condition in which he found them, but the servant of the railway company, lawfully on the bridge, engaged in an employment which, according to the testimony, necessarily required him to come in contact with the wires of the defendant company. These wires were visible, insulated, and to all appearances perfectly harmless. There was nothing in their appearance to warn the deceased of the great force being carried over them, or that there was any danger in coming in contact with them. The danger was a hidden and secret one, and the insulation of the wires deceptive. The familiar rule that one who deliberately goes into a place of known or apparent danger and is injured must take the consequences of his hardihood can have no application here, because there was in fact no apparent danger, but, on the contrary, so far as the deceased—a nonexpert—could ascertain from an examination, the wires were entirely

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safe, and in perfect condition. He had a right, therefore, to believe that the place was safe, and to assume that the defendant company had exercised due care and caution to prevent injury to him, and had not placed on the bridge, in such a position that he would likely come in contact with them, which it knew to be dangerous. It was using the bridge with the permission of the railway company for the support of wires used in the transmission of a highly dangerous, subtle, and invisible force, and was, therefore, chargeable with the duty of placing and keeping them, as far as practicable, in a condition to avoid injuring the servants of the railway company while at their work. Its duties and responsibilities in this respect are similar to those of an electric company, which, by permission of the owner, places its wires over the roof, or attached to a house or building; and in such case the rule is quite universal that the company is liable to the owner and his servants for injury received through its negligence by contact with its wires when making needed repairs or improvements to the building, if the injured party is in the exercise of due care and caution at the time.

The question respecting the care required of electric companies under such circumstances first came before the court in the case of *Clements v. Louisiana Electric Light Co.* (decided in 1892), 4 Am. Electl. Cas. 381, 44 La. Ann. 692. In that case the plaintiff's intestate—a tinsmith, engaged to assist in repairing the roof—was killed while at his work by coming in contact with the wires of the defendant company, placed four feet four inches above the roof. The wires were insulated, and to all appearances safe, but there was a defect in the insulation which caused his death while he was either attempting to go over or go under the wires, in trying to reach the gutter. The court held, after mature deliberation, that the company was responsible. And although there was involved in the case a failure to comply with a municipal ordinance requiring electric light companies to have the splices of their wires perfectly

sulated, it was considered that this ordinance added nothing to the duty or liability of the company. The court say, in speaking upon this matter, that "it (the wire) passed over a roof, to which people in adjoining rooms had access, and where, in the course of time, mechanics must go to make repairs, or laborers to sweep off or clean the roof. It was the duty of the company, independent of any statutory regulation, to see that their lines were safe for those who, by their occupation, were brought in close proximity to them." And in answer to the objection that the deceased was guilty of contributory negligence it said: "The deceased, Clements, was lawfully on the gallery roof. He was engaged in a service that necessarily required him to run the risk of coming in contact with defendant's wires, either by stepping over them or going under them. It is probable that the latter mode was the most convenient, and there is no evidence that in so doing he incurred any greater risk. The wires were visible, and, to all appearances, were safe. The great force that was being carried over the wires gave no evidence of its existence. There was no means for a man of ordinary education to distinguish whether the wire was dead or alive. It had all the appearance of having been properly insulated. From this fact there was an invitation or inducement held out to Clements to risk the consequences of contact. He had a right to believe it was safe, and that the company had complied with its duties specified by law. He was required to look for patent, and not latent defects. Had he known of the defective insulation, and put himself in contact with the wire, he would have assumed the risk. The defect was hidden, and the insulation wrapping was deceptive. It is certain, had it been properly wrapped, Clements would not have been killed. His death is conclusive proof of the defect of the insulation and the negligence of defendant. He exercised reasonable care in going under the wire in the performance of his duty, as he had a right to believe, from external appearances, that the wire was safe. His action was such as

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not to tend to expose himself directly to the danger which resulted in the injury. In fact, there was no apparent danger. So, also, in *Giraudi v. Improvement Co.*, 5 Am. Electl. C. 318, 107 Cal. 120, the plaintiff was sent on top of a building by the owner to adjust a sign which was about to be blown down by the wind, and, coming in contact with an electric light wire, placed along and near the roof, was injured, and it was held that the failure of defendant to place its wires at a sufficient distance above the roof to enable persons lawfully there to pass under them was sufficient proof of negligence to justify the verdict, and that plaintiff was not guilty of contributory negligence by going on the roof. The court said: "Defendant was using a dangerous force, and one not generally understood. It was required to use very great care to prevent injury to person or property. It would have been comparatively inexpensive to raise the wires so high above the roof that those having occasion to go there would not come in contact with them. Not to do so was sufficient proof of negligence to justify the verdict. If there was any excuse for not so locating the wires, it is on the claim that they were covered that there was no danger in coming in contact with them. The accident itself proves that this was not sufficient—*res ipsa loquitur*. The point most insisted upon here was that plaintiff was guilty of contributory negligence; that he knew, or ought to have known, of the location of the wires, and should have taken care to avoid them. It is not a case where the doctrine of negligent ignorance can apply. Plaintiff owed defendant no duty, and no part of his employment required him to know, or gave him opportunity to know. Unless it can be held that he did in fact know, there was no evidence which even tended to show negligence on his part."

And again, in *Ennis v. Gray*, 5 Am. Electl. Cas. 325, 8 Hun, 355, the plaintiff, a roofer, employed by the owner of a building, was injured while at his work by coming in contact with an electric wire of the defendant, which was attached

to the building, and which the evidence tended to show was placed without proper safeguards and improperly insulated, and the court held that the issue as to the defendant's negligence and the contributory negligence of the plaintiff was for the jury. In this case the defendant tried to escape liability by claiming that there was no contractual relation or other privity between it and the plaintiff which required it to protect him while at work for the owner of the building, and while on his premises, and that as to him the construction and maintenance of electric apparatus were *res inter alios*. But the court held that defendant was engaged in the business of supplying electricity for lighting purposes, and, considering the high voltage which it was necessary to carry over its wires, the business was of a character highly dangerous, and likely to result in injury to others unless conducted with care and skill; and therefore, outside of any contractual relation, the law imposed the duty upon defendant of using the necessary skill and prudence to prevent injury to persons coming in contact with its wires, not only as regards the public generally, but also with respect to any individual engaged in a lawful occupation in a place where he was entitled to be. So, also, in *McLaughlin v. Louisville Electric Light Co.* (Ky.), 18 Ky. L. Rep. 693, 6 Am. Electl. Cas. 255, 37 S. W. 851, a person engaged in painting a building was injured by coming in contact with an imperfectly insulated electric wire on the side of the building, while climbing out of a window upon the cornice, and in an action against the electric company to recover damages for the injury, it was held that the defendant was bound to exercise the utmost care to keep the insulation of its wires perfect at a place where people had a right to go for work, business, or pleasure, although very great care may be sufficient for wires at other places; that an apparently properly insulated wire is an invitation or inducement to such person to risk the consequence of contact with it; that the fact that the insulation of such wires is expensive or inconvenient

is no excuse for failure to make such insulation perfect in places where people have a right to go; and that the plaintiff in the action was not guilty of contributory negligence in coming in contact with the wires unless in so doing he failed to exercise the degree of care which an ordinarily careful and prudent person usually exercises under similar circumstances, and the question whether he exercised such care was for the jury and not the court. A like principle was applied in *Illingsworth v. Boston Electric Light Co.*, 5 Am. Electl. Cas. 322, 161 Mass. 583. The plaintiff was employed in the alarm system of the city of Boston. The city used for the lines of its system structures erected by the defendant electric company for the support of its electric wires. While the plaintiff was in the performance of his duties, and descending one of such structures, the pliers in his belt caught a wire belonging to the defendant, and in reaching around to clear them he received injury by the contact of his hand with a wire of the defendant, not properly insulated; and it was held, in an action against the company for damages, that the defendant's negligence in leaving the joints of its wires without insulation at such place, and the question whether the plaintiff was in the exercise of due care, should have been submitted to the jury. So, also, in *Griffin v. United Electric*, 6 Am. Electl. Cas. 252, 164 Mass. 492, a tinsmith, while engaged in placing an iron conductor on a building, was injured by receiving a shock from an electric light wire running along the side of the building about 12 feet from the ground, by reason of the conductor which he was handling coming in contact with a place on the wire where the insulating material had been worn off, and it was held that the question of defendant's negligence and of due care on the part of plaintiff were for the jury, and that it could not be held as a matter of law that the condition of the wire was so apparent that the plaintiff must or ought to have seen it, although the accident happened in the forenoon; and that, while

expert might consider it dangerous to touch any wire unless he knew it was a harmless one, no such degree of care could be required of the plaintiff, who was not an expert, but that the question of his want of care was for the jury. Applying the doctrine of these cases, and the underlying principles by which they are controlled, to the case in hand, it is clear that no error was committed in overruling the motion for nonsuit. It is true that in the cases referred to the actions were grounded on negligence in using improperly insulated wires, but in each instance the judgment of the court proceeds on the theory that it is a want of due care for a company handling and transmitting the highly dangerous force of electricity to use a wire known, or which reasonably ought to have been known, to be dangerous, at a place where others are lawfully entitled to be; and it is assumed in each instance that, but for the insufficient insulation, the wires would have been safe. The same principle governs here. Although the wires of the defendant company were insulated, it is admitted that such insulation was no protection whatever to persons coming in contact with them, and hence the negligence of the defendant is equally as great, if not greater, than if the danger had been from insufficient or want of insulation. The apparently perfect insulation was calculated to deceive, and to cause one unfamiliar with the facts to suppose the wires safe. It acted as an invitation to persons at work in and among the wires to risk the consequences of contact therewith. And such was the effect in this case. But for the insulation, and the belief of safety caused thereby, it is not at all probable that the deceased would have exposed himself to the risk of a contact with the wires in question. The defendant, however, knew that the insulation afforded no protection, and yet, with knowledge of that fact, put its wires in a place where the servants of the railway company might come in contact with them while in the performance of their duties, and without giving any warning or notice of the danger whatever. Under such circumstances a jury

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would certainly be justified in finding that it did not exercise due care and caution in so doing. Electric companies, of course, are not bound to have perfect apparatus or perfect construction, but they are required to exercise a degree of care and prudence in the construction and maintenance of the wires commensurate with the danger; and where the wires are designed to carry a strong and powerful current of electricity, so that persons coming in contact with them are certain to be seriously injured, if not killed, the law imposes upon the company the duty of exercising the utmost care and prudence to prevent such injury; and whether such care has been exercised in a given case is ordinarily for the jury. *Croww. Electricity*, sec. 234.

The cases cited and relied upon by the defendant are in point in this contention. In *Beck v. Railway Co.*, 25 O. 32, *Stone Co. v. Hobbs*, 11 Ind. App. 27, *Stone Co. v. O'Brien*, 12 Ind. App. 217, and *Flood v. Telegraph Co.*, 4 Am. Ele. Cas. 402, 131 N. Y. 603, the danger was open and visible and could have been ascertained by the complainant if he had exercised his faculties. In *Hector v. Light Co.*, 5 Am. Ele. Cas. 300, 161 Mass. 558, the facts are that a lineman of a telephone and telegraph company was sent to attach a wire to a standard owned by the defendant on the roof of a building. Instead of entering this building, and going out on the roof, he went up on a building some distance away, passed over the several intervening structures until he came to a building adjoining the one on which the standard was placed. While stooping down, to see how he could get from this building to the place of his destination, he came in contact with the wires of the defendant company, and was injured by reason of the insulation being worn off. The case was decided in favor of the defendant on the ground that it owed no duty to the plaintiff to maintain an effective insulation at the place where he was injured, where he was not sent to work, and where he had no right to be. The same is true of the cases

of the boy who was killed by coming in contact with the wire of an electric company while searching on top of a building for a lost ball. *Sullivan v. Railroad Co.*, 156 Mass. 378. In both cases the injured party was a trespasser, and at a place where he had no right to be, and where the company was under no obligation to protect him from injury. But in the case at bar the deceased was rightfully at the place where he was injured. In *McMullen v. Illuminating Co.* (City Ct. Brook.) 5 Am. Electl. Cas. 332, 13 Misc. 392, the defendant company had disconnected its service wires, carrying a low current of electricity, which could not cause death or great bodily harm, from the distributing wires in the cellar, eight feet above the ground, in order that the owner might make certain repairs, but failed to "tape" the ends of the wires, and it was held that it was not liable for an injury to a workman while engaged in making such repairs, because no reasonable person would, under the circumstances, have anticipated "that any person would have entered the cellar, mounted upon a box, and, after seeing these wires, taken hold of at least two of them at a time, in such manner as to make a short circuit, and bring the wires into contact with his hand in the same place, and thus burn his hand." In *Burk v. Electric Co.* (Sup.) 89 Hun, 498, the evidence shows that the deceased deliberately chose a way of known danger to go from one part of a cellar to another, when a perfectly safe way was open to him, and the court held that he must take the consequences of his own hardihood.

It only remains to notice briefly the assignments of error based upon the giving and refusal of instructions by the trial court. The defendant requested in writing some 14 different instructions, which were refused, except as given in substance in the general charge. All of these, except one, present different phases of the questions already considered, and therefore require no further notice. . . . The entire charge of the court as given seems to have been separated

into paragraphs, in some instances without special reference to the context, and objections made and exceptions saved the giving of each; and while the charge, which was given orally, is perhaps open to some criticism on account of the verbal inaccuracy of the language used, to which the attention of the trial court was not specially called at the time, it, however, in our opinion exhibits no reversible error, but when taken as a whole, fairly and accurately presents the law as applicable to the facts of this case. The definition of "negligence" as given is not open to the criticism made, nor did the court withdraw the question of plaintiff's intestate contributory negligence from the jury, but told them expressly that what he had said in regard to the defendant's liability must be taken with the proviso that the plaintiff's intestate did not himself contribute by his own negligence to the injury from which he died, and then proceeded with the charge in detail on that phase of the case. The statement that the words "care" and "diligence," when used in reference to the duty of the defendant, are not absolute, but relative, terms; "that when the danger is great, the care and vigilance to escape the consequence of danger must be proportionately great. In matters of this sort, where people are dealing with electricity (one of the most subtle, powerful, and wonderful agencies known to man; an agency that is very destructive to human life even when carefully and properly handled and treated), I instruct you that in such a case as this due care would be the highest care and vigilance of which a man is capable, as which the condition of science makes known at the time. And this is the degree of care which was demanded of the company to so conduct itself in regard to the wires on that bridge that the diligence and care should be proportionate to the danger which there existed,"—is but, in effect, an application of the case in hand of the rule that the care demanded of electric companies must be commensurate with the danger, and that where their wires are carrying a highly dangerous current

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of electricity, as is admitted to have been carried over the wires which caused the death of plaintiff's intestate, the law imposes upon the company the utmost degree of care in their construction, inspection, and repair, so as to keep them harmless at places where persons are liable to come in contact with them. *Crosw. Electricity*, § 234; *Haynes v. Gas Co.*, 5 Am. Electl. Cas. 264, 114 N. C. 203; *Railway Co. v. Conery*, 6 Am. Electl. Cas. 217, 61 Ark. 381; *Giraudi v. Improvement Co.*, 107 Cal. 120, and authorities heretofore cited. The questions in this case are important, and many of them of first impression in this State, and therefore we have given to the case that consideration which its merits deserve; but, finding no error in the record, the judgment must be affirmed, and it is so ordered.

NOTE.—See note to *Alton Ry. & Illum. Co. v. Foulds*, *post*; also note 2 at end of Part III.

BRIDGET MOONEY V. LUZERNE BOROUGH.

Pennsylvania Supreme Court, May 16, 1898.

(186 Pa. 161.)

INJURY BY ELECTRIC SHOCK—MUNICIPAL LIABILITY.

A telephone wire crossed a charged electric light wire, in close proximity thereto. It had been in the same place fifteen years. For several months it had been unused and sagged so as to interfere with travel. Finally it was cut by a municipal officer, and one end wrapped around a post within easy reach of pedestrians upon a bridge, with one end resting upon the ground or in the water. On the same night, plaintiff's intestate came in contact with the telephone wire, received a shock and was killed. *Held*, sufficient evidence to warrant a verdict against the municipality, upon the ground that the death was the natural and probable consequence of the manner in which the telephone wire was fastened to the post.

A municipality in such a case is not released from liability by the fact that the maintainers of the wire may be also liable.

Mooney v. Borough.

APPEAL by defendant from judgment of Court of Common Pleas, Luzerne county.

D. O. Coughlin and George R. Bedford, for appellant.

William R. Gibbons and William S. McLean, for appellee.

STERRETT, C. J.: The appellant borough not only complains of the manner in which the case was submitted to the jury, but it challenges the right of the court to submit the questions in any form. The evidence bearing on all the disputed questions was quite sufficient to carry the case to the jury. It would have been manifest error to have affirmed defendant's verdict on the third point. The fact that the telephone wire had been maintained in the same place for 15 years without accident affords no reason why it should continue there indefinitely without inspection. Directly the opposite conclusion was warranted by the facts, but it was for the jury. Taking into view the fact that the telephone wire had been in same place for 15 years, in connection with the further facts that the telephone line had been unused and abandoned for several months; that it crossed a charged electric light wire, in close proximity thereto; and finally, that a few months before the accident the old telephone wire sagged to such an extent as to interfere with public travel on the streets, and we have a condition of affairs that was at least sufficient to admonish the municipality that more than ordinary care should be exercised in the supervision of overhead wires in question. When, under such circumstances, the sagging wire is cut by a member of the borough council and one end wrapped around a post within easy distance of pedestrians on the highway crossing the bridge, with the other end resting on the ground or in the water, the defendant has no just reason to complain that the question of its alleged negligence was submitted to the jury. The evidence was quite sufficient to justify the latter in finding that the accident which resulted in the sudden death of plaintiff's son was the natural

and probable consequence of the manner in which the telephone wire was fastened to the post.

The only remaining question that requires notice is one presented by the second specification. Defendant contends that, while a municipality is invested with police supervision of the wires of corporations occupying its streets, such supervision does not involve pecuniary responsibility, and, if an accident happens from a failure to maintain the wires in safe and proper condition, the corporation owning the wires, and not the municipality, is alone responsible for resulting injuries; and *West Chester v. Apple*, 35 Pa. 284, is cited as authority for the position. While language used in the opinion in that case may justify the conclusion sought to be drawn therefrom, it was not necessary to the decision, and it has been expressly disapproved in *Philadelphia v. Smith*, 23 W. N. C. 242, and 1 Monaghan, 147. In that case it was held by this court that the liability of a municipality for damages for injuries caused by defective sidewalk is not relieved against by the fact that the property owner is also liable. The same rule applies to dangerous defects or obstructions in the highway, whether overhead or at grade. The duty and liability of the municipality is in no way lessened by the fact that individuals or corporations are subject to a like duty and liability. The learned trial judge was therefore right in affirming plaintiff's point that "it is the duty of a municipality to exercise a careful supervision over the adjustment and regulation of the electric wires suspended over its streets," and that it is liable for injuries resulting from neglect of such duty. In view of the multiplicity of overhead wires carrying deadly currents and the increasing frequency of accidents from defects in such wires, or in the manner of their adjustment, it behooves municipalities to recognize and perform their duties in the premises in more than a perfunctory manner, if they would escape the consequences of negligence. Neither of the specifications of error is sustained. Judgment affirmed.

NOTE.—See note 2 at end of Part III.

GANNON V. LACLEDE GASLIGHT COMPANY.

Missouri Supreme Court, July 6, 1898.

(145 Mo. 502.)

INJURY BY ELECTRIC SHOCK—RES IPSA LOQUITUR.

Where plaintiff showed that her intestate, while in discharge of his duty as a city fireman, stepped upon a fallen electric wire of the defendant company, which had broken and was lying upon the public highway, and was thereby killed, a *prima facie* case of negligence on the part of defendant was made out, and the burden rested upon defendant to show want of notice or other valid excuse.

Appeal by defendant from judgment of Circuit Court of St. Louis County, entered upon a verdict for plaintiff.

Henry Hitchcock, for appellant.

T. J. Rowe, for respondent.

ROBINSON, J.: This action was begun by the respondent Annie Gannon, against appellant, to recover \$5,000 for the death of her husband, William Gannon, alleged to have been caused by the fault of the defendant company as set out in her petition, containing the following substantial averments: "That plaintiff is the widow of William Gannon, deceased. That the Laclede Gaslight Company, defendant, is a corporation under the laws of Missouri, engaged in the business of furnishing and selling electric light throughout the city of St. Louis, Mo. That in conducting said business the defendant had erected and strung upon poles along the streets and alleys of said city wires charged with a certain dangerous and life destroying fluid and current known as electricity; and that on the 18th day of April, 1894, on a certain public highway of said city, to wit, in an alley running east and west through the block

bounded on the north by Sheridan avenue, on the south by Thomas street, on the east by Elliot, and on the west by Lef-fingwell avenue, through and along which alley it then and there had erected and maintained as aforesaid its said wires, so as aforesaid charged with electricity, in the conduct of its said business, and at a point in said alley in the rear of residence No. 2737 Thomas street, the defendant negligently and carelessly permitted its said wires, to the number of six or seven, then and there charged as aforesaid, to become broken in two, and to fall to the pavement of said alley, and to remain broken in two and down for a long time then and there, while full charged with electricity as aforesaid, when it knew, or ought by the exercise of any care and caution to have known, that the said wires were so as aforesaid broken and down, and liable, if touched by any human being while so broken down and charged as aforesaid, to destroy human life. And plaintiff states that, while the said wires were then and there in said alley broken in two and down and charged as aforesaid, her said husband, while walking along in the said alley at said point, struck with his foot against one of said defendant's said wires, and was thereby instantly killed, by the fault and recklessness and carelessness of the said defendant then and there in the premises as aforesaid, to her damage in the sum of \$5,000, for which sum plaintiff prays judgment." Defendant's answer was a general denial, coupled with a plea of contributory negligence on part of plaintiff, to which plaintiff replied, denying the allegation of new matter contained in defendant's answer.

At the close of plaintiff's testimony in chief the defendant asked the following instructions: "The court instructs the jury that, on the pleading and evidence, the plaintiff cannot recover, and the verdict will be for defendant," which being refused, the defendant offered testimony on its part to the effect that the wires belonging to defendant that killed plaintiff were melted or burned in two by reason of a fire originating in a stable that was fronting on the alley in which its wires were

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strung; that said fire was not caused by the wires, and that its origin was unknown; that the defendant was not notified of the existence of the fire, or that its wires were broken down in the alley where the fire occurred, until after plaintiff's husband had been killed, and that said wires were down upon the ground in the alley only a short while before plaintiff's husband was killed; that there was no appliance at defendant's power house at the time to indicate when one of its wires was grounded, and that defendant had at the time of the fire a contract with the city for lighting certain streets and alleys with electricity, and also certain public and private institutions, which required it to keep in operation during the day a constant current of electricity passing over its wires. At the close of all the testimony in the case, defendant again prayed the court to instruct the jury "that, upon the pleading and all the evidence, the plaintiff cannot recover;" which being refused, the jury, under proper instructions submitted by the court, found a verdict for plaintiff for \$3,000, on which in due time judgment was entered, and to reverse which, on account of error alleged in refusing defendant's two peremptory instructions, this case is here. No objection is made now to the proposition of law announced in the instructions given by the court, if the refusal of defendant's instruction at the close of the case is held good. The sole controversy has grown out of the application of the law thereto, under the peculiar averments of the petition.

The plaintiff, to sustain her case, offered testimony tending to show that William Gannon, in respect to whose death this action was begun, was the husband of plaintiff; that he came to his death by stepping upon an electric wire belonging to the defendant company that was broken in two and lying upon the ground in one of the public alleys of the city of St. Louis, charged with an electric current of more than double the voltage necessary to kill a human being; that plaintiff's husband was at the time in the discharge of his duty as one of the city firemen, trying to extinguish a fire that had originated in a

stable fronting on the alley where he was killed, and along which defendant, by permission of the city, had strung its electric wires, for the purpose of enabling it to furnish light to the city and for various private consumers along the course of the line; that two of a series of seven of defendant's wires strung overhead in said alley were down when plaintiff's husband arrived at the fire, and two other of the firemen engaged with him were also stunned and knocked to the ground at and near the same time and place.

The defendant's contention here is that no testimony was offered which tended to prove that the death of plaintiff's husband was caused by negligence on part of defendant, after the manner as alleged in her petition; that no substantial evidence, nor any evidence whatever, was offered by plaintiff tending to show, either that the wires in question became broken in two or fell to the ground in consequence of any negligence on part of defendant or its agent; or that said defendant knew, or ought by the exercise of ordinary care or caution to have known, that said wires were so broken and down at or before the time when plaintiff's husband was killed; or that defendant or its agents, with knowledge or notice, actual or constructive, that said wires were broken and down in the alley where plaintiff's husband was killed, did negligently permit said wires to remain so broken and down for a long time after notice thereof. And in the second place, it is contended by defendant that, if it be conceded that a *prima facie* case was made by plaintiff in the first instance, it was entirely overcome by the positive and uncontradicted testimony of defendant's witnesses, and for that reason a finding should have been directed for defendant by the court at the close of the case.

While there is no doubt of the general proposition, so vigorously and repeatedly asserted by the counsel for appellant in his elaborate and able brief filed herein, "that a party cannot declare upon one cause of action, upon one negligent act, and recover upon an entirely different act of negligence, without a

disregard of all rules of pleading and practice," it must be borne in mind that it has likewise been a rule of long practice and frequently asserted in this court, based upon the principles of propriety and fairness, that a party will not be driven out of court merely from the fact that he or she has alleged more than has been proven, when the unproven allegations are shown to be unnecessary averments to authorize a recovery; nor will plaintiff's action be denied merely because the testimony offered does not support certain averments in her petition when it does support other averments which are sufficient to authorize a recovery. *Knox County v. Gaslight Co.* 105 Mo. 182, 16 S. W. 684, and cases cited. Here the plaintiff in her petition not only alleged the act from which defendant's negligence might be inferred when shown, but went further to say that the act of negligence was committed or suffered under circumstances that admit of no excuse, that is, under circumstances that admit of no excuse that is, notice, etc.

Plaintiff's petition was complete when the charges had been made that her husband had met his death upon one of the public alleys of the city, when in the discharge of his duty as a fireman, and without fault upon his part, by stepping upon an electric wire of the defendant charged with electricity, that the defendant had negligently suffered to become broken in the street and fall to the pavement of the alley. The other averments were of carelessness on part of defendant, that it knew, or ought to have known, of the exercise of care and caution to have known, that said wire was broken and down, and liable, if touched by a human being, to destroy human life, while so broken and down, and charged with electricity, to destroy human life, and the fact that the act of negligence alleged to have occurred, after the particular manner detailed in the petition, was not shown in all its fullness, is not fatal to a recovery, if sufficient was shown to have made a *prima facie* case of negligence under any of the charges made, and is not a disregard of the rule of pleading and practice that prohibits a variance between allegations made and proof shown. Su

no harm could be said to have come to defendant because of plaintiff's failure to establish all that was alleged, if what was proven, under the allegations disclosed, showed defendant liable; nor can defendant be said to be surprised at the variance between the proof and the allegations of the petition, if that shortage or variance was in the failure to establish facts that were alleged which defendant must have affirmatively asserted and shown not to have existed, in order to relieve itself from the *prima facie* case made by the facts proven. It is scarcely necessary to assert that it was the duty of the defendant company to so keep at all times its electric wires, over which was continuously being transmitted that most dangerous energy, force, or fluid known to man called "electricity," out of the way of the citizen, that contact with them would not occur as he went to and fro in the prosecution of his business. It was a matter of the plainest duty for the defendant to see that the streets and alleys of the city, along which, by permission, it was suffered to place its overhead wires for its own private gain, were at all times maintained in the same condition, as to safety from danger of electricity, as they were before its overhead use thereof was begun; and a most imperative duty was placed upon defendant, in assuming the overhead use of the public alley with its wires, to see that persons passing along and using the alley were not injured thereby; and when proof, under the allegations of plaintiff's petition, was made showing that one or more of defendant's wires charged with its death-dealing force was down upon one of the public alleys of the city, and that plaintiff's husband met his death in the discharge of his duty, a *prima facie* case of negligence was made out against defendant, and the burden was then put upon it to show that its wires were down in the alley through no fault of its agents and servants, notwithstanding the plaintiff had alleged, further, that said wires were permitted to become broken in two and to remain down and broken in said alley for a long time, when it knew, or ought to have known, by the exercise of care and cau-

tion, the broken condition thereof. The unnecessary or additional allegations made on part of plaintiff cannot have the effect of changing the presumption that the law raises from the proof of a given state of facts, and, when that presumption attaches from proof made of facts alleged, the after allegation will not stay the course of procedure resulting therefrom.

Plaintiff by her testimony made out a *prima facie* case of negligence against defendant, although her proof was not full after the manner the negligence was charged in her petition. The proof of facts that were alleged was adequate to cast the burden upon defendant of showing the nonexistence of negligence on its part, notwithstanding plaintiff went further in her petition, and charged that the negligent act complained of was done under circumstances that could not be defended against. In the case of *Gurley v. Railroad*, 93 Mo. 445, often quoted, and so much relied on by respondent, the proof was of an entirely different act of negligence from that alleged in the petition. It was not mere variance, resulting from incomplete proof of unnecessary averments, as in the case at bar. There the proof was that defendant negligently left certain of its cars on its track without securing them, by reason of which a collision occurred, causing an injury to plaintiff while the allegation of the petition was that defendant's agent negligently drove a loose car against certain other cars standing on its track, whereby plaintiff was injured. There the negligence shown was no part of the negligence charged, and had no tendency to establish, either presumptively or conclusively, the existence thereof. In fact the proof on part of plaintiff, in the *Gurley* case, showed the nonexistence of the allegations made in the petition, and the court properly held there was a fatal variance between allegations made and proof shown, or a want of proof to support the allegation of the petition.

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The judgment of the trial court will be affirmed.

NOTE.—See note to *Trenton Pass. Ry. Co. v. Cooper*, ante; p. 446; also note at end of Part III.

CLIFTON W. WALTERS v. THE DENVER CONSOLIDATED ELECTRIC LIGHT COMPANY.

LEVINA E. WALTERS v. SAME.

Colorado Court of Appeals, Oct. 10, 1898.

(12 Col. Ct. Ap. 145.)

DUTY OF INSULATING WIRES—NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE.

It is a question for the jury whether an electric light company was negligent in attaching wires not insulated to an insulator fastened upon the side of a dwelling just below and within reach from a window thereof. It is a question for the jury whether a boy, twelve years of age, was negligent in attempting to replace such insulator upon the support from which it had been removed.

The proximate cause of an injury to the boy was the condition of the wires and not the act of the boy in coming in contact with them.

It can not be said to be negligence for a mother to attempt to remove her child from contact with a live electric wire, whether or not she had any knowledge that her act would be attended by danger to herself.

Appeals by plaintiffs from judgments of the District Court of Arapahoe County, dismissing the complaints in the respective actions.

Wells, Taylor & Taylor, and R. T. McNeal, for appellants.

Wolcott & Vaile and William W. Field, for appellee.

THOMPSON, J.: Two cases are here submitted to us for decision. They are both against the same defendant, and, for the most part, involve the same questions. In each case, when it came on for trial, the defendant objected to the introduction of any evidence for the plaintiff, on the ground that the complaint did not state facts sufficient to constitute a cause of action. The objections were sustained, judgments entered for the defendant, and appeals prosecuted by the plaintiffs. The averments of the complaints, therefore, constitute the only subject for discussion in this opinion.

The complaint of the plaintiff Clifton Wood Walters sets forth that the defendant was engaged in the operation of machinery and apparatus for producing electricity, and supplying it to dwelling houses in the city of Denver; that it had extended its wires to the house of Charles W. Walters, the father of the plaintiff, for the purpose of supplying light to that house; that it had attached to the house, near to and directly under the window, an electric device, called a converter, and near to and above the converter, and directly under the window, had placed two iron supports to hold glass insulators, to which were attached wires, connecting with the house, and conveying the electric current for furnishing light to the house; that the defendant had carelessly suffered the wires to become uncovered and uninsulated; that the plaintiff, a child 12 years of age, who was residing with his father, upon looking out of the window and seeing that one of the insulators had been removed from its iron support, and knowing nothing of the danger incident to his coming in contact with the wires attached to the insulator, seized hold of the insulator for the purpose of replacing it upon its support, and received a charge of electricity from the naked wire which his hands touched in seizing the insulator, resulting in serious and permanent injury to him. The objections to the complaint, stated in their logical order are: First, that the facts alleged do not constitute negligence on the part of the defendant, within the contemplation of the law; second, that the complaint shows that the proximate cause of the injury was the act of the plaintiff in seizing the insulator, and not the exposed condition of the wire; and, third, that it appears upon the face of the complaint that the plaintiff was guilty of negligence contributing to his injury.

1. It is argued that there was no statute, ordinance, or other express law which required the defendant to equip all of its wires with insulated covers, and that, therefore, taking into consideration the situation of this exposed wire, no duty rested

upon the defendant to keep it insulated. We may concede that at places where there is no apparent possibility of injury ensuing from electric wires it would not be negligence to leave them uncovered, and that no duty to keep them insulated would exist, unless it was imposed by some express law. But by this concession the question whether, consistently with the degree of care exacted in the management of an agency so dangerous as electricity, it was or was not the duty of the defendant to have its wires insulated at the particular place where this injury occurred, is by no means disposed of. The wire in question was affixed to the outside of the wall of the house of the plaintiff's father, directly under one of the windows, and within the reach of persons looking out of the window. The plaintiff was a child, living with his father, and had the right to be in the house, and at the window. Upon seeing one of the insulators out of its proper place, and without knowledge or apprehension of the danger attendant upon his act, he undertook to replace the insulator, and so received an electric charge from the naked wire. The insulator was a harmless looking object. There was nothing to give notice of the deadly force hidden in the wire. The accident was one liable, and which the defendant must have known was liable, to happen at any dwelling to which electric appliances were similarly affixed, and in which there were children, or persons ignorant of the purpose of the appliances, or the nature of the electric fluid; and we cannot say, as a matter of law, that proof would not be admissible, under the averments of the complaint, which would justify a verdict that in leaving the wire exposed as alleged the defendant was guilty of negligence. If such proof would be admissible, then the complaint in so far as the charge of negligence is concerned, is sufficient.

2. The contention of the defendant is that the proximate cause of the injury was the act of the plaintiff in taking hold of the insulator. Certainly, his act brought him in contact with the naked wire, and, except for what he did, he would have

suffered no harm. But we think counsel have fallen into some confusion respecting the legal meaning of the term "proximate cause," and, possibly, in dealing with the subject, there is a lack of desirable clearness in the language of some of the authorities. The responsibility of an agency for the production of an event is not necessarily dependent upon proximity in time. It is the logical relation between the two, whether they are immediately connected or not, by which the question of proximate cause is to be determined. Conditions subsequently coming into existence may set an agency in motion, but the event which results is the effect of that agency, and not of the intervening conditions; and, because the relation between it and the event is that of direct cause and effect, it is the proximate cause. Succeeding occurrences are merely the means by which it is brought into operation. In *D. & R. G. R. R. Co. v. Bedell*, 11 Colo. App. 139, we had occasion to examine this question, and we reached the conclusion that the efficient and responsible cause was the proximate cause, without reference to its place in the order of events. Now, the injury to the plaintiff was the direct result of the escape into his body of a current of electricity from the naked wire with which he came in contact. If the wire had been protected, he would not have been hurt, and, in its uninsulated condition, the result would have been the same, whether he had grasped it voluntarily, or had been involuntarily forced against it. The immediate cause was the electricity concealed in the wire, the discharge of which into the body of the plaintiff was brought about by the contact which took place between himself and the wire; and the contact was merely the condition which enabled the cause to operate. The question of the legal effect of the boy's act in reaching out to the wire is in no manner connected with the question of proximate cause. It can be considered only in an examination of the charge of contributory negligence.

3. It is maintained that the complaint shows such contributory negligence on the part of the plaintiff as to preclude a re-

covery by him. The question of negligence is a mixed one of law and fact, and, except in rare cases, its determination belongs to the jury. However, conduct may be so palpably imprudent and reckless as to leave no room for a difference of opinion concerning its character; and then, there being no facts to find, deliberation by a jury is unnecessary, and the court may apply the law directly to the case before it. But where, upon facts in its possession, the character of the conduct is in any degree involved in doubt, it is never proper for the court to withdraw the question of negligence from the jury. We do not think that from the statements of this complaint it can be said, as a matter of law, that the plaintiff was guilty of contributory negligence. He was rightfully in his father's house, and he was rightfully at the window. Seeing something out of place which was attached to the house, directly under the window, and within his reach, it might very naturally occur to him to replace it; and his act in so doing, if he had no knowledge of the purpose of the attachment, and no reason to apprehend danger from it, could hardly be called recklessness. It might have been simply the result of an involuntary impulse to restore order where he found disorder, and to do something which he had no grounds for supposing he could not do with perfect safety. Under issues made upon the complaint, proof is admissible from which contributory negligence might be found, and under the allegations of the complaint proof is admissible from which a contrary conclusion might be drawn; and we do not conceive that we have the right to say that the averment of an act, which, upon issue joined, may be interpreted for or against him by the evidence, amounts to an admission, conclusive upon him, that his own want of care contributed to his injury.

The complaint of Levina E. Walters, after setting forth the facts upon which negligence was charged against the defendant in substantially the language of Clifton Wood Walters' complaint, averred that she was the mother of Clifton, and that upon learning that he was in a situation of danger, she went in

great haste to his assistance, seized upon him to remove from the wire, and received a charge of electricity which passed from the wire through the body of Clifton into her body, that she so sustained the injury of which she complained. We have heretofore said on the subject of negligence and on the subject of proximate cause is applicable here, and need not be repeated, but on the question whether her complaint shows contributory negligence in her, we think it well to venture a few observations. It is in voluntarily taking hold of Clifton, while he was still in contact with the wire, that the negligence is to be found. She stated in her complaint that at the time she had no knowledge that her act would be attended by danger to herself, but the allegation is unimportant, and may as well have been omitted. The instincts of a mother, when she sees her child in distress, will lead her to rush headlong to his rescue, without stopping to count the cost or measure the danger which she is incurring; and to say that an act to which affection irresistibly impelled her should be charged against her as something imprudent and unnecessary would be to shock the sentiment which is as universal as mankind. The law is not the creature of cold-blooded, merciless logic, and its inherent justice and humanity will never for a moment permit the act of a mother in saving her offspring no matter how desperate it may have been, to be imputed to her as negligence, or at any time or in any manner used to her detriment. See Whart. Neg. § 308. We think that in each case the court erred in forestalling a trial, and both judgments are therefore reversed. Reversed.

NOTE.—See note 2 at end of Part III.

OVERALL V. LOUISVILLE ELECTRIC LIGHT CO.

Kentucky Court of Appeals, October 18, 1898.

ELECTRIC LIGHT COMPANY—DEGREE OF CARE TO INSULATE WIRES.

It is the duty of an electric light company whose wires are maintained near telephone wires to know that linemen of the telephone company must, in the course of their duties, come into close proximity with the electric light wires.

It is the duty of a company maintaining and using in its wires a deadly current of electricity, to furnish perfect protection at those points where people are liable to come in contact with the wires. "The highest degree of care and skill usually exercised by prudent persons engaged in the same or similar business," is not enough.

Case of this series cited in opinion: *McLaughlin v. Louisville Elec. L. Co.*, vol. 6, p. 255.

Junius C. Klein and Matt O'Doherty, for appellant.

BURNHAM, J.: Plaintiff alleges in this action that he was employed as lineman by the Ohio Valley Telephone Company and that while engaged in fastening a stay or guy wire for that company to the top of one of its poles, without fault on his part, it came in contact with one of the wires of the defendant company, which was heavily charged with electricity and which was not properly insulated, and that by reason of such defective insulation of the wire of defendant company he received a severe shock, which seriously injured him, and for which he seeks to recover damages herein. Defendant denies all the affirmative allegations of the petition, and alleges that the injuries complained of were caused by the contributory negligence of the plaintiff, and that without such contributory negligence they would not have occurred. The trial resulted in a verdict for appellee and appellant prosecutes this appeal, asking a reversal for a number of alleged errors. The proof conduces to show

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that the wires of the Ohio Valley Telephone Company and those of the Louisville Electric Light Company were both strung along the same street, with the poles of each company alternating; that the wires of the electric light company were put up subsequent to those of the telephone company, and were about 12 or 15 inches lower; that appellant was engaged with a force of workmen under a foreman of the telephone company, in passing a guy wire or stay wire from the top of one of the telephone poles to a stay pole across the street on the opposite side; that the guy wire was necessary to hold the pole in an erect position; that the telephone company had other wires leading from the pole in the opposite direction up an alley; that it was the duty of appellant to fasten his end of the wire to the top of the pole, and the duty of the other workmen to fasten their end to the pole on the opposite side; that appellant succeeded in getting the wire—which consisted of three strands—in proper position and had about completed his job, when he suddenly received a shock and injuries complained of.

The testimony is not clear as to the precise manner in which this accident occurred, but it is the contention of appellant that the guy line came into contact momentarily with the outside line of the defendant company, which at that time was charged with over 2,000 volts of electricity. There is proof in the record which tends to show that there is no such thing as perfect insulation of a wire of the size charged with this amount of electricity, but the evidence also conduces to show that the insulation used by appellee at the point of the accident was not the best employed by it, as its own witnesses testified that it uses a rubber insulation around awnings, windows and places where its wires are likely to come in contact with some object, which is much safer than the insulation employed at the point where the accident occurred; and it also tends to show that where a larger wire is used a much less voltage is sufficient to perform the same work and is therefore much safer.

Appellant at the time he was struck was in a place where his business required him to be, and where he had a right to be, and it was the duty of the electric light company to know that line-men of the telephone company would have to come into close proximity to its wires in attending to their duties, and it was its duty to use every protection which was accessible to insulate its wires at that point, and at all points where people have a right to go for business or pleasure, and to use the utmost care to keep them so, and for personal injuries resulting from its failure in that regard it is liable in damages. Mr. Thompson, in his work on electricity (sec. 65), says: "It may be doubted whether persons or corporations employing for their own private advantages so dangerous an agency as electricity ought not to be regarded as *quasi* insurers, as towards third persons, against any injurious consequences which may flow from it. It may be doubted whether one who collects, or rather creates, so dangerous an agency, ought not to be held to the obligation of restraining it—that is, of insulating it,—at his peril." And in the recent case of *McLaughlin v. Louisville Elec. Light Co.*, 6 Am. Electl. Cas. 255, 37 S. W. 856, this court says: "It seems clear to us that appellee should have been required to have had perfect protection on its wires at the point and place where appellant was injured. The fact that it was very expensive or inconvenient is no excuse for such failure. 'Very great care' might be sufficient as to the wires at points remote from public passways, buildings or places where persons need not go for work or business; but the rule should be different as to points where people have a right to go for work, business or pleasure. At the latter points or places the insulation or protection should be made perfect, and the utmost care used to keep it so." And this doctrine has been laid down in a number of well considered opinions cited in the opinion *supra*. Electricity is the most powerful and dangerous element known to science. It cannot be seen, and it is as silent as it is deadly, and it follows that those who manufacture and use it for private advantage must

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do so at their peril. The only way to prevent accident a deadly current is used is to have perfect protection at points where people are liable to come in contact with it. The jury in this case should have been instructed that it was the duty of the defendant. To have told them "that it was the duty of defendant to observe the highest degree of care and skill usually exercised by prudent persons engaged in this or similar business, to keep its wires so insulated as to be reasonably safe and free from danger to persons who might come in contact with them," was not sufficient. The law requires protection at those points where such contact is likely to take place, from this unseen and terrible power. For the reasons indicated, the judgment is reversed, and the cause remanded for proceedings consistent with this opinion.

NOTE.—See Mr. Keasbey's notes to *Alton Ry. & Illum. Co. v. Anderson* and *Anderson v. Jersey City Elect. L. Co.*, *post*; also, note 2 at end of III.

 NEWARK ELECTRIC LIGHT & POWER COMPANY V. THE
 RUDDY.

New Jersey Supreme Court, Nov. 7, 1898.

(62 N. J. L. 505.)

INJURY BY ELECTRIC SHOCK—RES IPSA LOQUITUR.

(Head-note by the Court):

Proof that an electric light wire, controlled by a private corporation, normally suspended upon poles along a public street, was trailing on the sidewalk, affords a presumption of negligence in a suit against such corporation by a person injured through electric shock by contact with such wire. "*Res ipsa loquitur*."

Cases of this series cited in opinion: *Haynes v. Raleigh Gas. Co.*, 264; *Trenton Pass. Ry. Co. v. Bennett*, vol. 7, p. 444; *Clarke v. Elec. R. Co.*, vol. 6, p. 234.

Appeal by defendant below, from judgment of Circuit Court, Essex County.

Richard V. Lindabury, for plaintiff in error.

Samuel Kalisch, for defendant in error.

COLLINS, J.: The plaintiff, a child of eight years, picked up from the sidewalk of a public street the end of a broken wire that trailed from one of the poles on which it should have hung suspended, and sustained severe injury through electric shock. The wire was an electric light wire, under the control of the defendant. This writ of error removes a judgment, on verdict, in favor of the plaintiff in a suit brought to recover damages because of alleged negligence, in the premises, of the defendant. No explanatory or exculpatory evidence was offered in defense.

(After stating the facts:) The counsel for the plaintiff in error very properly limited his argument to the question of whether or not the facts proved warranted the submission of the case to the jury on the point of defendant's negligence. That question, now presented by exceptions to the refusal of the court to nonsuit the plaintiff or to direct a verdict in favor of the defendant was, by law, permitted to suspend along a public street a wire so charged with electricity as to be dangerous to the public if it should break and fall upon the street. This privilege entailed upon it a very high degree of care to maintain the wire intact. It was permissible to presume a lack of exercise of such care when the proof showed the wire broken and trailing on the sidewalk under conditions that rendered possible serious injury to persons lawfully there. Unexplained, the presence on the highway of the charged and broken wire, and the fact of injury received therefrom, justified an inference of negligence in the defendant in whose control and management it was. Such an inference has been judicially permitted even when the wire that broke received the electricity from a wire on

which it fell. *Haynes v. Raleigh Gas. Co.*, 5 Am. Electl. Cas. 264, 114 N. C. 203. It appeared, indeed, that the wire was covered with an insulating substance, of which but a small portion at the broken end was gone, and, if the plaintiff had not chanced to touch this small exposed portion of the wire, he would have received no shock. Still, as it is plainly possible that any break of such a wire may remove the insulation sufficiently to lead to such a result, the defendant, if chargeable at all, must accept that consequence. It happened that the plaintiff was able to produce no witness who had noticed that the wire was down except within five or ten minutes before the plaintiff took it up, and it was argued that so short a space of time forbade any presumption of negligence in not removing it. This argument is beside the point. The plaintiff was not bound to prove when the wire came down. Its presence at the time and place of injury sufficed. Had it appeared affirmatively that the wire had but just fallen, the presumption of negligence would have been simply narrowed to the breaking of the wire. Only in case it had appeared that the breaking was without negligence would the question of reasonably prompt removal have arisen.

We may assume that such a wire, of proper size and quality, skillfully set up and inspected with sufficient care and frequency, will not spontaneously break, and, on the other hand, that undue strain or improper use may weaken such a wire, and cause its fracture. There remains the possibility of disruption caused by the elements or outside interference. Here lay the stress of the defendant's argument. It was contended that the plaintiff was bound to eliminate every such cause by disproving its existence; but to this argument I cannot yield assent. It is impracticable to frame a rule of general application on a subject so concrete as that involved in a jury's right to say that a particular occurrence speaks in itself of negligence. It was well said by Mr. Justice GARRISON in *Bahr v. Lombard, Ayres & Co.*, 24 Vroom, 233, that "the question of proof which a plaintiff must give in order to draw from the defendant explanatory evi-

dence must with certain limits be dependent upon the circumstances of each case." One text writer sententiously sums up the matter thus: "If the accident is connected with the defendant, the question whether the phrase, '*res ipsa loquitur*,' applies, or not, becomes a simple question of common sense." Smith, Neg. p. 248. The following statement is fairly satisfactory: "Where it is shown that the accident is such that its real cause may be the negligence of the defendant, and that, whether it is so or not, it is within the knowledge of the defendant, and not within the knowledge of the plaintiff, the plaintiff may give the required evidence of negligence, without himself explaining the real cause of the accident, by proving the circumstances, and thus raising a presumption that, if the defendant does not choose to give the explanation, the real cause was negligence on the part of the defendants." CHANNELL, B., in *Bridges v. North London Railway Co.*, L. R. 6 Q. B. 377, 391. The weakness of this statement is inherent in all attempts to formulate the rule. The circumstances to be proved are, as they must be, left indefinite. A plaintiff must, of course, present all evidence reasonably within his power. The case of *Bahr v. Lombard, Ayres & Co.*, *ubi supra*, is authority that, "when the plaintiff's case shows that he has not produced material evidence clearly within his reach, the mere proof by him of the occurrence of an accident by which he was injured does not raise a presumption of negligence which the defendant can be called upon to rebut." This is both reasonable and just; but to exact from a plaintiff such negative proof as will exclude all possible theories of accident consistent with defendant's care would be unreasonable, and would not accord with common sense.

In the brief of counsel, it is complained as follows: "No attempt was made to show that there had been no storm or other violence to account for the falling of the wire. From anything that appeared, a tree, a wall, a pole, a trolley wire, or some other object may have fallen upon it and broken it. The local

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circumstances were as much, at least, within the knowledge of the plaintiff as of the defendant. The accident happened at the door of the plaintiff, and he must have known and have been able to show whether or not there was any external cause for the breaking of the wire. He could at least have shown that it parted without any apparent reason other than its own weakness. This complaint assumes a duty in the plaintiff to prove what were not the circumstances of the case, instead of what they were, and puts on him a burden properly belonging to the defense. In *Sheridan v. Foley*, 29 Vroom, 230, this court adjudged that a nonsuit was wrong, although the only proof for plaintiff was that a brick fell from among defendant's workmen, bricklayers and hodcarriers, engaged in constructing a wall at a considerable height. By the argument now pressed upon us, the nonsuit should have been upheld, because the plaintiff failed to disprove a hurricane or seismic disturbance. In *Trenton Pass. Railway Co. v. Bennett*, 7 Am. Electl. Cas. 444, 31 Vroom, 219, the only proof of negligence was the fact that a horse was shocked by electricity when he stepped upon the track of defendant's street railway. The Court of Errors and Appeals sustained the submission of the case to the jury. In an almost exactly similar case an appellate division of the New York Supreme Court reached like result. *Clarke v. Nassau Electric Railroad Co.*, 6 Am. Electl. Cas. 234, 9 App. Div. (N. Y.) 51. In that case, as here, the defendant argued that, to sustain an inference of negligence, all other hypotheses must be excluded by the plaintiff's proof. It was suggested that the defendant's road might have been in perfect order, and that the accident might have been occasioned by the carelessness of third persons engaged in stringing telegraph or telephone or electric light wires. BARTLETT, J., thus met the argument: "The rule is one that relates merely to negligence *prima facie*, and it is available without excluding all other possibilities. . . . The doctrine of *res ipsa loquitur* simply calls upon the defendant, after proof of the accident, to give such evidence as

will exonerate him, if any there be, and relieves the plaintiff from the burden of proving the nonexistence of an adequate explanation or excuse."

In the case before us, how could the plaintiff have shown that the wire "parted without any apparent reason other than its own weakness?" He had no control over, or power or opportunity to examine and test it. Proof that the fracture must have come from external violence was peculiarly within the province of defendant. It could have proved how and when the wire was put up; to what usage it had been subjected; how often, how carefully, and how recently it had been inspected, and what its appearance after disruption indicated. In short, the defendant could have exonerated itself from the *prima facie* case made against it if exoneration had been possible. The plaintiff was not called on to conjecture and disprove possibilities of exoneration. The judgment will be affirmed.

NOTE.—See Mr. Keasbey's note, *ante*, p. 446; also note 2 at end of Part III.

THE NEWARK ELECTRIC LIGHT & POWER COMPANY V. SARAH
MCGILVERY, Administratrix, &c.

New Jersey Supreme Court, Nov. 7, 1898.

(62 N. J. L. 451.)

INJURY BY SHOCK—NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE.

(Head-note by the Court):

A company authorized to place wires in public highways, which wires it uses in its business to transmit an electric current which is dangerous, must exercise a high degree of care to prevent injury to any person using the highways for passage; but to one who, with others, breaks down such wires, and so exposes them, uninsulated and dangerous, it owes no duty except to refrain from willful acts to his injury, and it will not be responsible for an injury received by him while handling the wires so broken, because it maintained or renewed the current passing over them.

Appeal by defendant below from judgment of Circuit Court, Essex county.

Richard V. Lindabury and Depue & Parker, for plaintiff in error.

Samuel Kalisch, for defendant in error.

MAGIE, C. J.: This action was brought in the Essex Circuit by Sarah McGilvery, the defendant in error, and the widow and administratrix of John McGilvery, deceased, to recover damages from the Newark Electric Light & Power Company, the plaintiff in error, for causing the death of her intestate on July 22, 1895, by negligence. To a declaration charging negligence, the company pleaded the general issue, and a verdict was rendered in favor of the administratrix, and this writ of error was brought upon the judgment entered on that verdict.

The sole question presented by the assignments of error is whether there was evidence proper to be submitted to the jury upon the issue in the cause. If so, it was not erroneous to refuse to nonsuit, or to direct a verdict for the company, upon which refusals exceptions were sealed.

In deciding this question, we must attribute to the evidence such credibility and force as a jury might. An examination of the evidence shows that the jury might find established the following facts, viz.: That deceased on the day of his death was a lineman in the employ of the Consolidated Traction Company, and engaged, with other of its employees, composing a gang in charge of a foreman, in taking down a "feed wire" belonging to that company from poles in a public street in Newark; that in taking down the feed wire it fell upon and broke a wire of the Electric Light & Power Company, which was strung upon the same poles, and was used to furnish a current for electric lights, etc.; that the ends of the broken wire lost some part of their insulating cover, and fell to the ground; that the end of it which was nearest the power house of the company was tested, and

found to be dead, and was handled where the insulation was off with impunity; that deceased, at the direction of his foreman, immediately afterwards took hold of that end of the wire with his bare hands, and received a shock from an electric current which caused his death within a few minutes. These facts could be found upon direct evidence. From the circumstances proved, the jury might further infer and find that the breaking and exposure of the wire, and its contact with the ground, occasioned the melting of a "fuse" in the power house of the company, whereby the current was cut off from the wire, and it was left "dead;" and that the current was thereafter turned on that wire by the insertion of another fuse by some employe of the company, and thereby the wire became dangerous to any one who, standing upon the ground, should touch it where it had become uninsulated and exposed. It was admitted on the trial that the electric company had authority to stretch wires upon poles in the public street in question, and to use them for conveying the electric current for light, etc. It did not appear to whom the poles belonged, or what rights thereon the electric company and the traction company had acquired.

It is contended for plaintiff in error that upon these facts, which present the case most favorably for the administratrix, the verdict in her favor could not have been rendered, either because they show that deceased contributed to his death by his own negligence, or because they fail to show any negligence on the part of the company which charged it with liability to deceased or to his administratrix. The contention that, upon the facts above stated, the contributory negligence of deceased so clearly appeared that the case should have been taken from the jury, cannot prevail. It is true that deceased, from his experience and observation in his employment, must be deemed to have known the danger of handling a naked wire through which the electric current is running, and he did seize and handle this wire without the precaution of putting on India-rubber gloves. But, if the evidence was believed, he had just seen another per-

son seize and handle the same wire in precisely the same mode, and without any injury. It was therefore plainly a question for the jury to say whether he might not reasonably infer that the wire was innocuous, and whether his act exhibited a want of that reasonable care for his safety which was the measure of his duty. Whether the weight of evidence should have produced a different response to the question cannot be considered an error. On the facts which the jury might find, they could infer that deceased was not negligent.

The contention that, upon the facts, viewed in the light most favorable to the administratrix, the negligence of the company, and its liability therefor to the deceased or to his administratrix, was not made out, presents a much more difficult question. Since liability in such a case arises only from negligence, and negligence in this respect can only be predicated upon the doing of some act by the company which its duty to deceased required it not to do, or in refraining from doing some act which the like duty required it to do, it is obvious that a proper solution of this question requires a preliminary determination as to what duty, under the circumstances, the company owed the deceased.

Two observations may serve, I think, to give a clearer view of the real question thus presented. In the first place, it is plain that the company was in no possible sense responsible to deceased for the fall of the wire. Such companies, using in business wires to carry a subtle and invisible power highly dangerous to life, must, although authorized to stretch such wires along poles in public highways, exercise a very high degree of care for the safety of those who may be thereby exposed to danger. In that regard they owe a duty to every one using the street in the ordinary mode, and if from insufficient support, or from causes which a high degree of precaution would have prevented, the wires fall in the street, and do injury, they are doubtless responsible. But in this case the wire fell, not because of any act or omission of the company, but because deceased and those associated with him broke it down. Whether the breaking was in-

tentionally done, or was produced by negligence or mere accident, the company is in no way responsible to those who broke it for any injury to any of them, at least for any injury which was the direct result of the breaking. In the next place, the death of deceased was not the direct result of the fall of the wire. If the exposed end of the wire had fallen upon deceased while it was still charged with a dangerous current, and by such fall the current was passed through his body to his injury, it would be impossible to find any negligence chargeable to the company. A like result would follow if the wire, after the fall, continued to be charged with the current, and, upon his picking it up, the current was passed through his body to his injury, at least until the company had some notice of the condition of the wire. In each case the injury would be attributable, not to the company, but to those who, by breaking the wire, had made it a cause of injury. But in the case before us the jury might find, as we have seen, that, after the fall of the wire, it became inert and innocuous, and could be and was handled with impunity. If that be so, the death was the result of the turning on of the current again by the insertion of the new fuse, and the exposure of the wire occasioned by the fall was the only means by which the injury was inflicted.

The real question, therefore, is what duty devolved on the company, under the circumstances, with respect to the insertion of a new fuse, and thereby renewing the current through this wire? The evidence does not make clear that the melting of the fuse gave notice to the company that the wire was broken and grounded; for the expert evidence is that such melting might be caused by a short circuit resulting from a crossing of the wires as well as by the grounding of a wire. Such melting, therefore, only gave notice that one or the other cause had operated.

To persons unconnected with the breaking of the wire, and using the street in the ordinary mode, I have no doubt the company owed a duty to refrain from sending a current through the wire until it was ascertained that it was safe to do so. But,

Light and Power Co. v. McGilvery.

in my judgment, one who had participated in breaking down the wire cannot charge the company with that duty until he has given it notice of the broken wire and its being grounded. If it could be claimed that, in the absence of proof that this current was carried on wires which might cross, the jury might find that the melting of the fuse gave notice that one of the wires was broken and grounded, a like distinction in the duty devolving on the company exists. As to persons unconnected with the breaking of the wire, and traversing the street in the ordinary way, its duty would be to refrain from turning on a current until it had been ascertained it was safe to do so. But to one who, like deceased, had participated in breaking down and exposing the dangerous wire, and who thereafter intermeddled with it, the company owed no duty except to refrain from willful acts to their injury. The subsequent handling of the wire, which was exposed by the breaking and fall, was a mere continuation of the act which had broken the wire and caused it to fall. With respect to that wire, the gang of which deceased was one were either trespassers, or, at the most, licensees, and the measure of duty to such is that above stated. *Phillips v. Library Co.*, 26 Vroom, 307. The result is that the evidence did not justify the submission to the jury of the question of the company's liability, because it did not show that the company was guilty of breach of a duty which it owed to the deceased. There should therefore have been a verdict directed for the company, and for the refusal to direct such verdict the judgment must be reversed.

NOTE.—This was affirmed as *McGilvery v. Newark Elec. L. & Power Co.*, 63 N. J. L. 591.

NOTE.—See note on *Anderson v. Jersey City Elec. Light Co.*—E. Q. K.

ROSE T. O'FLAHERTY, Respondent, v. NASSAU ELECTRIC RAIL-
ROAD COMPANY, Appellant.

*New York Supreme Court, Appellate Division, Second Department, Novem-
ber, 1898.*

(34 App. Div. 74.)

INJURY TO TRAVELER BY SHOCK—RES IPSA LOQUITUR.

Plaintiff, walking in the street, was twice thrown down, at about the time and place where defendant's trolley wire, broken, fell. *Held*, a question for the jury whether her fall was occasioned by shock from the wire.

The fact that a trolley wire breaks and falls into the street raises a presumption of negligence which, in an action based on injuries caused thereby, the company is bound to overcome.

Testimony that the company in the construction of its trolley wire, and the supports for the same, used the best material in the market and that in common use; and examined them once in every four days; and examined the wire which broke and its supports the day before the accident, *held*, not necessarily to overcome this presumption, first, because it came from interested witnesses, employes of the company, charged with the duty of inspection, whom the jury were not bound to believe; and second, because there was evidence to warrant the finding that a device employed by the company, called a "breaker system," designed to throw the current off the wire the moment it came in contact with the ground was either not properly adjusted, or was not in proper working order.

Case of this series cited in opinion: *Jones v. Union Railway Co.*, vol. 7, p. 447.

Appeal by defendant from judgment of Supreme Court, Kings County, entered on a verdict of \$7,000 for plaintiff, and from an order denying motion for new trial made upon the minutes.

Clarence J. Shearn (*Henry Yonge* with him on the brief),
for the appellant.

Thomas E. Pearsall, for the respondent.

HATCH, J.: Although the record in this case is somewhat voluminous, in its disposition but little discussion is required. It is undisputed that the defendant's trolley wire broke, and one end of the broken piece fell to the ground. The plaintiff, at the time when the wire broke, was passing along the street, as was lawfully her right; and at about the time the wire fell she was in its immediate vicinity. The evidence satisfactorily discloses that she received a shock of electricity sufficiently violent to throw her to the ground, and that upon regaining her feet she was again shocked and was again thrown down. While much argument by the appellant is devoted to showing that the plaintiff was not in the vicinity where the wire grounded, yet plaintiff's testimony was that something struck her upon the back; that she received a shock, and the testimony of an eyewitness was that the wire was near her when it fell. That she was thrown down twice is not disputed, and it was for the jury to say whether her fall was occasioned by electrical shock. Measurements and statements of witnesses as to particular places where the wire struck or remained upon the ground are not conclusive. It is not entirely clear from the testimony whether she received the shock by coming in contact with the wire, or whether she occupied such a position as caused her body to form a circuit through which the electricity, flowing from the broken wire, or some part of it, passed. Either conclusion, we think, is permissible from the testimony.

The injuries which the plaintiff thus received were serious and, as the evidence tended to establish, permanent in character. While it is true that injuries arising from fright alone do not authorize a recovery, yet where there is physical injury accompanying fright, it furnishes basis for a recovery of damage. Here the jury were authorized to find the existence of electrical shock and fright produced by it, the whole causing plaintiff's present condition. The falling of the trolley wire into the street raised a presumption of negligence on the part of the defendant, and in the absence of contributory negligence, as to

which no claim was made that it existed, created a liability for the injuries thus sustained, unless the defendant satisfactorily explained the conditions so as to overcome the presumption of negligence which thus arose. *Jones v. Union Railway Co.*, 7 Am. Electl. Cas. 447, 18 App. Div. 267. The defendant claims that by its proof it successfully met the presumption, and established by conclusive evidence that it was without fault. In this regard it is contended that its evidence established that it used, in the construction of its trolley wire, and the supports for the same, such material as is commonly in use for such purpose, and the best which the market affords; and that its method of construction and supports was in accordance with the best plan which practical use has demonstrated to be proper.

It is also contended by the defendant that, in addition to thus establishing the use of proper material and care in construction, it had a system of inspection under which its trolley wire and the supports were carefully examined at least once in every four days; and in addition thereto that the wire which broke, and the supports in connection therewith, were inspected the day before the wire broke, and found to be in perfect order.

We think there are two considerations appearing in the testimony, which answer this claim. The system of inspection which the defendant claims to have existed rests for its support upon the testimony of interested witnesses, charged with the duty of discharging this obligation. Under well-settled rules, therefore, this testimony was that of interested persons, who had, or might have, a motive for shielding themselves from blame. Under such circumstances their credibility was involved, and became a question to be determined by the jury. *Volkmar v. M. R. Co.*, 134 N. Y. 418.

In addition to this, it was disclosed by the testimony that the defendant employed a device called the breaker system, which, when properly constructed and in proper working order, would throw the current off the wire the moment it came in contact

with the ground. This device was explained by Professor Sheldon, an expert witness called by the plaintiff, whose testimony upon this subject is adopted by the defendant as correct. This witness testified that this breaker would have the effect claimed for it if it was properly adjusted.

As we have before observed, the jury were authorized to find that the plaintiff received her injuries by reason of the passage through her body of the current of electricity coming from the ground after the same had escaped thereto from the broken wire. Upon this subject Professor Sheldon said: "The trolley wire and the system of feeders constitute a good conductor; the rail and the supplementary conductors for return also constitute a good conductor; the wire striking the ground, as between it and the rail, between its terminal and the rail, a fairly large resistance, if the human body, through the shoes, through the feet, should be interposed between those two points, the rail and the wire—the wire should strike the ground—the human body offering resistance about the same as that of the earth would divide the current with the earth in returning it to the rail." The jury were, therefore, authorized upon this testimony to find that the automatic device was either not properly adjusted, or was not in proper working order, for had it operated properly the current would have been immediately cut off, and thus none passed through the body; whereas it continued to escape for a period long enough to twice shock the person. Under such circumstances the jury were permitted to find that the condition of the wire and its appliances were not consistent with the testimony of the defendant, and therefrom conclude that the defendant was guilty of negligence in not discharging its duty. *Scherer v. Holly Manufacturing Co.*, 86 Hun, 37. It follows, therefore, that this claim of the defendant may not be sustained.

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It follows that the judgment should be affirmed, with costs.
Judgment and order unanimously affirmed, with costs.

NOTE.—See Mr. Keasbey's note, *ante*, p. 446; also note 2 at end of Part III.

THE CITY OF KANSAS CITY, KANSAS, v. GRACE FILE ET AL.

Kansas Supreme Court, Jan. 7, 1899.

(60 Kan. 157.)

INJURY BY ELECTRIC SHOCK—JOINT LIABILITY.

(Head-note by the Court).

When an electric light wire in a city breaks and falls down and remains in the street for three weeks, constituting thereby a dangerous obstruction to travel, and causing injury to a passer-by, both the city and the electric light company are presumed from the lapse of time to have knowledge of its condition and dangerous character, and both may be joined in an action for damages for injuries resulting from their negligent omission to cause the wire to be repaired. DOSTER, C. J., dissenting.

In an action for damages against two joint tort feorsors, the court may, after verdict against both, for good cause refuse a new trial to one while allowing it to the other.

Appeal by defendant from judgment of Court of Common Pleas, Wyandotte county.

T. A. Pollard, City Attorney, and *George B. Watson*, for plaintiff in error.

Dail & Bird, for defendants in error.

DOSTER, C. J.: This was an action brought by Grace File, a little girl, against the city of Kansas City, Kan., and the Consolidated Electric Light & Power Company, to recover damages for injuries sustained on account of the negligence of the defendants in allowing one of the conducting wires of the light company to break and fall to the street, and with which, while remaining in the street and when charged with an electric current, she came in contact. While not pertinent to any legal aspect of the case, it is interesting to note that the broken

ends of the wire were about 80 feet apart, one of them lying upon the ground, the other suspended in the air, or, possibly, resting against one of the supporting poles. This breakage in the wire, as electricians explain, and as is common observation, destroyed the continuity of the circuit so far as the usual conducting medium was concerned. However, the electric current was on at the time of the little girl's injuries, and therefore must have been passing between the broken ends of the wire through the earth and the supporting pole spoken of, or through space without any visible conducting medium,—a rare, if not hitherto unobserved, phenomenon, as experts stated. The plaintiff ignorantly and innocently took hold of the end of the wire lying upon the ground, and was severely and permanently injured by the consequent shock. A verdict and judgment were rendered in her favor. The defendants filed separate motions for a new trial. That of the electric light company was sustained; that of the city overruled; and it therefore prosecutes error to this court.

The first claim of error, and the one principally discussed, is the misjoinder of the city and the electric light company as defendants. It is contended that the obligation of these two parties to prevent the electric wires from becoming obstructions or agencies dangerous to the people of the city proceeds from different sources; that no relations of contract or of public or municipal policy existed between them making the care of the wires a joint duty; that no obligation rested upon the city to inspect the wires of the electric light company, or to superintend the business of lighting the streets, so as to charge it jointly with the company for damages resulting from the latter's delinquencies. We are, however, constrained to view the rule of practice differently from that taken by the city. There is no question but that separate actions might have been maintained against the defendants and separate judgments recovered. However, but one satisfaction could be had. The policy of the Code is to settle the whole subject-matter of any

controversy in one action. This rule of policy is collectible out of several of the sections relating to the joinder of parties and of causes of action. Whatever may have been the rules of practice at common law, the Code, which in legal as well as in equitable actions seeks the adjustment of inter-related controversies in a single suit, lends strong countenance to the joinder of defendants in such cases, if the plaintiff so elects; but, aside from the rules of the Code, and going to the metaphysical question of relationship between the two defendants, there was a community of action, or rather of negligent omission, upon their part. Each was under obligation to see that the electric wire in question did not fall down and remain upon the ground,—the city because of the general oversight of the streets which the law requires it to take, the electric light company because of its obligation to prevent its property from becoming a dangerous menace to the public safety. If it be admitted that these obligations are different, or spring from different sources, they nevertheless concur to one end,—to the end of avoiding, among other and similar consequences, just such injuries as the plaintiff sustained. The concurring neglect of these respective obligations produced a single consequence, and must therefore be viewed as joint and mutual. The petition alleges that the wire in question broke and remained down for three weeks before the accident occurred. This was time enough to charge the city as well as the company with knowledge of its condition, and from which its concurrent disregard of its duty is plainly to be inferred. Inasmuch as the duty in question rested upon both city and company, and inasmuch as each possessed knowledge of the other's failure to discharge the obligation, it can fairly be said that each so concurred in the other's negligence as to mutually and jointly with it conduce to the plaintiff's injury.

Error is claimed because of the refusal of the court to grant a new trial to the city, while allowing one to the electric light company. The case against the two defendants was, of course,

tried as a single action. What the reason was for awarding a new trial to one while refusing it to the other, is not satisfactorily shown by the record. Counsel in argument say the court thought that the evidence of the electric light company's ownership of the line of wire upon which the accident occurred, was not satisfactorily established. If so, its action was justifiable. Be that as it may, no legal reason exists why a new trial might not be granted to one defendant and denied the other. The plaintiff could have prosecuted actions against them separately and recovered separate judgments. Neither one had the right to insist upon the joinder of the other with it; and, in fact, as already stated, the city objected to the joinder of the electric light company with it. Inasmuch as separate actions could have been maintained against each of the defendants, neither one of them had the right to insist that the other be retained in the case until final trial and judgment. The plaintiff in error, in support of its position, cites the cases of *Raymond v. Keseberg*, 83 Wis. 303, 54 N. W. 612; *Everroad v. Gabbert*, 83 Ind. 489, and *Albright v. McTighe*, 49 Fed. 817. The reasoning of these cases, however, does not commend itself to us. Many other claims of error are made. We have carefully examined them all, but do not find any of them well founded. The judgment of the court below is therefore affirmed.

DOSTER, C. J., wrote dissenting opinion.

NOTE.—See Mr. Keasbey's note to next case.

THE NEW YORK & NEW JERSEY TELEPHONE COMPANY ET AL.
v. GORDON BENNETT.*New Jersey Court of Errors and Appeals, March 6, 1899.*

(62 N. J. L. 742.)

SHOCK FROM LIVE WIRE IN HIGHWAY.

(Head-note by the Court):

The plaintiff picked up a wire that was lying in a public highway, and was injured by an electric current. He brought suit against the telephone company, whose wire it was, and against the trolley company, whose current, it was contended, did the harm. *Held*, that the question whether the linemen of the telephone company had been reasonably diligent in discovering the fallen wire, and in preventing probable injury, was properly left to the jury.

Whether the failure of the trolley company to use guard wires was negligence by which the plaintiff was injured, was for the jury.

Cases of this series cited in opinion: *Suburban Elec. Co. v. Nugent*, vol. 6, p. 238; *Trenton Pass. Ry. Co. v. Bennett & Cooper*, vol. 7, p. 444.

Appeal by defendants below from judgment of Supreme Court, upon a verdict.

Flavel McGee, for plaintiff in error, N. Y. & N. J. Teleph. Co.

Charles L. Corbin, for plaintiff in error, Atlantic Highlands, R. B. & L. B. Electric Ry. Co.

Edmund Wilson, for defendant in error.

GARRISON, J.: The plaintiff, a countryman, who had driven into the town of Red Bank, stopped his horse near a drinking fountain that stood at the intersection of Front and Broad streets; and in order to remove some wire that lay in the street, between his horse and the fountain, picked it up, and received through it a powerful electric current, that inflicted permanent

injuries, for which he brought suit against the New York & New Jersey Telephone Company, whose wire it was, and against the Atlantic Highlands, Red Bank & Long Branch Electric Railway Company, whose current, it was contended, did the harm.

The defendants were each maintaining wires in a public highway, in the exercise of franchise, not of an easement. Hence each was bound to take reasonable care not to injure other users of the streets. *Suburban Electric Co. v. Nugent*, 6 Am. Electl. Cas. 238, 29 Vroom, 658; *Trenton Pass. Ry. Co. v. Bennett and Cooper*, 7 Am. Electl. Cas. 44, 31 Vroom, 219.

One factor in the measure of reasonable care is the probable result of negligence. In the use of a powerful electric current in the public streets, reasonable care is great care.

If it was the duty of the telephone company to use reasonable care to prevent its wires, which were comparatively harmless, from coming in contact with naked wires that carried a powerful electric current, and if it was the duty of the trolley company using such powerful current to protect its naked wires from such contact by the use of a degree of care reasonably proportionate to the probable results, neither of these defendants has any just ground to complain of the charge of the trial court.

For by its charge the court did not permit the jury to hold either of the defendants to so strict an account in its use of the public streets. On the contrary, in respect to each its liability was limited to a single act of alleged negligence, upon which there was proof pro and con. Against the trolley company the plaintiff was permitted to recover only in case he established that its failure to use guard wires was negligence by which he was injured; and, in regard to the telephone company, the right to a recovery was confined to the single question of a reasonable diligence of its employees in discovering the fallen wire, and in preventing the probable results. As propositions of law, neither defendant can complain of the submission of these issues to the jury, unless there was in the case

no testimony competent to the establishment of the affirmative propositions of fact involved. That there was with respect to the use of the guard wires such testimony appears from the summing up of the trial justice, which accurately shows the state of the evidence upon this point: "Experts in electricity and electric railways have been called on both sides. On the part of the plaintiff it is claimed by this expert testimony that the prudent management of an electric railway requires, and that it is usual in such management, to have a guard wire or guard wires under such circumstances. On the part of the defendant railway company the expert testimony is that it is not prudent to have such guard wires, or, rather, to put it differently, that proper prudence does not exact it; that there is a balancing of dangers; that, on the one hand, you consider the constant danger that may come from such a wire being liable to be pulled down, and especially at curves, and, on the other hand, the more or less infrequent danger of an overhead wire falling across the trolley wire; and that, while in the early history of electric railways guard wires were usual, their use had at the time of this accident been in many places abandoned. As I understand the few adjudged cases there are on this subject, it is a matter that must be left to you to determine, as to what prudence required at this particular place; having regard to all the circumstances, and with reference to the danger of one of the telephone wires falling upon the trolley wire." The submission of this question to the jury was clearly not erroneous.

Upon the question whether the conduct of the linemen of the telephone company showed reasonable care, there was likewise testimony upon which the verdict may legally rest. Several witnesses spoke of the interval of time that elapsed between the falling of the wire before it burned off, and between its burning off and the accident to the plaintiff; estimating each period at from two to four or five minutes. During these periods occurred the episode of the horse that became entangled

in the wire. There was testimony, also, as to the attitude of the linemen during these periods, and that they had to be sent for before they came to the plaintiff's relief. As this is not a rule to show cause, it is immaterial whether the employes of the telephone company contradict this testimony, or whether their version of the occurrence would absolve them from negligence. The question was a proper one to be left to a jury. It was properly submitted, and there was testimony that, if believed by the jury, established the negligence of the telephone company. The case turns upon the above propositions of fact, and not upon the application to them of any principle of law that is not thoroughly established.

The contributory negligence of the plaintiff was likewise a jury question, pure and simple. How much a countryman would know about the danger of picking up a wire in the streets of a town, what inferences he ought to have drawn from what he saw, and whether, on the whole, his conduct showed less than reasonable caution, were entirely within the domain of fact. Stress was laid upon the circumstances that he had seen the horse that became entangled in the wire; but that affair was susceptible of two inferences, one of which was that the horse was scared by the mere contact with the wire, not by the transmission of an electric current.

Two questions to which objection was made by the telephone company were allowed by the trial justice, upon which error has been assigned: First, whether the plaintiff, in going with his horse direct to the fountain, would have come in contact with the wire. This inquiry was proper. It bore upon the reasonableness of the plaintiff's conduct in removing the wire. The other question was whether the linemen were still up the poles when the plaintiff came in contact with the wire. This bore upon the conduct of the defendant's servants, and was properly admitted. A number of questions that were put by the telephone company and overruled have become of no moment, for the reason that they concerned matters upon which the lia-

bility of the defendant was not permitted to turn. Finally, upon the question of damages the court below was clearly right in excluding the testimony of a witness called to see how much use he had of his hand after an accident somewhat similar to the plaintiff's. Neither was there any error in the charge that, if the plaintiff had employed a responsible and reputable physician, he (the plaintiff) had a right to assume that the treatment was proper, and could not be kept out of damages because with a better physician he might have had better results. If he used reasonable care to select a reputable doctor, it was enough.

There is in the case no error for which the judgment should be disturbed.

NOTE.—“Although the absence of guard wires may be an element of negligence, yet it cannot be said as a matter of law that either or both of two companies maintaining different lines of wires in the same street are bound, in the absence of negligence to maintain guard wires for the purpose of preventing the harmless wires of the one from coming in contact with the dangerous wires of the other.” Keasbey on Electric Wires, sec. 269; *Albany v. Watervliet Turnpike & R. R. Co.*, 76 Hun, 136, 27 N. Y. Supp. 848, 4 Am. Electl. Cas. 367; *Bloch v. Milwaukee St. Ry.*, 89 Wis. 371, 61 N. W. Rep. 1101, 5 Am. Electl. Cas. 293. In the absence of guard wires, and negligence being found, both companies may be held liable for the injury. *United Electric Co. v. Shelton*, 89 Tenn. 423, 14 S. W. Rep. 863; *McKay v. Southern Bell Teleph. Co.*, 111 Ala. 337, 19 So. Rep. 695, 6 Am. Electl. Cas. 223; *Western Union Tel. Co. v. Thorn*, 28 U. S. App. 123, 64 Fed. Rep. 287, 5 Am. Electl. Cas. 283.

With regard to the proper precaution to be used for keeping telephone wires from coming in contact with heavily charged wires, see Keasbey on Elec. Wires, sec. 198; *Nebraska Teleph. Co. v. York Gas & Elec. Light Co.*, 17 Neb. 284, 43 N. W. Rep. 126, 3 Am. Electl. Cas. 364. E. Q. K.

THE ALTON RAILWAY AND ILLUMINATING COMPANY V. THOMAS
L. FOULDS, Adm'r.

Illinois Appellate Court, March 10, 1899.

(81 Ill. App. 322.)

DEATH BY SHOCK FROM ELECTRIC LAMP.

Plaintiff's wife, taking hold of the wire or metal socket of an electric lamp in her house, in the act of lighting it, received a fatal shock.

There was evidence of a grounded primary wire, and of conditions rendering it possible for the current to pass around instead of through the transformer; neither of which alone could, but both together might, have caused the deadly current to enter the house, resulting in the death in question.

Held, that the question of defendant's negligence was proper for the jury.

Statement of the case: The appellee's dwelling house, except the basement, in the city of Alton, was wired and electric lamps placed therein by appellant, about June 1, 1896, and the basement was wired and one or more lamps installed therein by it two or three months later, and appellant furnished light for the house.

About six o'clock in the evening of September 26th of that year, appellee's wife, Ellen A., went down into the basement to turn on the light, so that the iceman, who had preceded her, could see where to put the ice. Immediately on taking hold of the lamp, she received a shock and fell to the ground floor, and in falling came in contact with the iceman, who was standing close to her, and he also received a shock from the contact that knocked him down. As soon as he regained his feet, observing that she still held the lamp or wire, he tried to separate her from it, and was thrown away from her some distance. He got up and went to the ice wagon, about 200 feet distant, and informed his companion of the occurrence, and he went to a

Dr. White's house, about 300 feet from Dr. Fould's house, and informed people there of the accident, and Dr. White and both ice-men went to Dr. Foulds' house. As Dr. White went into the cellar he saw electric sparks trickling along the cellar bottom and saw Mrs. Foulds lying on the bottom of the cellar, when he stooped down and moved her about six inches, and in doing so was knocked back to the cellar steps. Soon thereafter appellee, who had been at his barn, came, and on being informed of the situation and danger, he wrapped a piece of old carpet about the wire and succeeded in releasing it from his wife's grasp. From the time Mrs. Foulds took hold of the lamp to turn on the light, to the time when she was separated from it, from ten to fifteen minutes elapsed, and about this time the family physician arrived, but Mrs. Foulds was dead. An examination by the physician revealed a scar inside the right thumb and forefinger, and a burn some two or three inches in width extending down her back to her hips, so badly charred that when touched it crumbled in his hands.

Appellee brought suit against appellant in action on the case for carelessly and negligently permitting its wires and conductors of the electric current, and other appurtenances connected therewith, used to furnish lamps and lights to plaintiff and his intestate, to become and remain out of repair and without proper and sufficient insulation, and the wires uninsulated, to come in contact with trees, whereby the current escaped therefrom and became grounded and liable to be communicated to persons using said lamps, and in carelessly and negligently permitting its transformer and appurtenances used in furnishing such light to become and remain out of repair and without proper insulation, and by reason thereof said current passed through the body of plaintiff's intestate, causing her death, while she, in the exercise of ordinary care, was in the act of turning on a lamp in the basement or cellar of plaintiff's house.

A verdict and judgment was rendered in favor of plaintiff below for \$3,500, and defendant has appealed to this court.

John G. Irwin and Henry S. Baker, attorneys for appellant.

Travous & Warnock, attorneys for appellee.

BIGELOW, J.:

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At the close of the plaintiff's evidence in chief, it had been shown by evidence not afterwards contradicted, that Mrs. Foulds was killed by an electrical current that passed over the wire, connected with which was the metal socket which she held in her hands; and it had also, by like evidence, been shown that the current continued its passage through her, until the socket or wire had been wrenched from her grasp by her husband, ten or fifteen minutes after she first took hold of it; but no specific evidence had been introduced tending to show how the increased voltage that caused her death got on the wire, further than that the primary wire between the transformer near Dr. Foulds' house and the electric light plant, had at times come in contact with the trees and burned them, and that such contact would make a ground, and this evidence was also not thereafter contradicted.

The defendant then introduced evidence tending to prove that its plant and appurtenances were of the best in use; that they were kept in good condition, and that insulators had been put on some of the trees that the primary wire came in contact with, and that its wires were daily tested for grounds, with other evidence tending to show that it was not negligent in maintaining and operating its entire system, and it also introduced testimony of several witnesses who testified that at or about the time of the accident an electrical storm was passing not far distant.

It then called a number of expert witnesses, who testified that, in their opinion, the death of Mrs. Foulds was caused by a static discharge of electricity, in consequence of the electric storm, and that it could be accounted for in no other way.

Plaintiff, in rebuttal, introduced several witnesses, who contradicted defendant's witnesses in regard to the existence of an electric storm at the time of the accident

The plaintiff then called A. L. McRey as a witness, and his testimony as abstracted, was as follows:

"I live in St. Louis, and am a consulting electrical engineer. [After further qualifying as an expert]: "I visited the house of Dr. Foulds on October 1, 1896, and I made an examination of the lines leading from State street down to the transformer. I found that the lines passed through a number of trees, and in one or two places the limbs of the trees had been burned by the wires, and tree insulators had afterwards been put in on some of the places. At the time I made the examination there were one or more contacts on each of the two lines where the insulation had been worn off and the bare copper had come in contact with the limbs. I think the contact was sufficient to produce a ground. A ground is where the current from the wires leaks off by any means to the ground. It would simply mean there is a path for the current to leave the wire and go down to the ground. I made an examination of the transformer and its surroundings at the same time; I did not examine the transformer; I simply applied the magneto bell to the wires on the outside of the transformer; the test showed that the wires leading to the house were clear; the magneto bell I had was made to ring at a resistance of 25,000 ohms, and my test showed that the circuit to the trees had an insulating resistance greater than 25,000 ohms; I mean the secondary wires. I further found that there was a slight ground on the primary wires leading through the trees to the transformer. At the time I made this test, there were with me Mr. Chittendon, Mr. Booth and Dr. Foulds. When I made the examination of the transformer, I further found that the wires that lead out from the transformer were bare; the primary wires and the secondary wires were not in contact; there was plenty of room for them there, but they were liable to come in contact.

"The top of the pole had a cross-arm on it, and the cross-arm has glass insulators and the wires coming from the line are fastened to the glass insulators and this goes down to the transformer, and the secondary wires coming out from the transformer go out to the cross-arm, and from there over to the other side of the street and into the house. The transformer makers, in making these coils, leave about ten inches or a foot of the wire on the outside. They bring it to the outside of the transformer and leave about eight or ten inches of wire there, and those wires are connected on the light wires, and in making the connection, they have to scrape off the insulation, so as to get a connection between copper and copper, and after the connection is made, the best method is to wrap insulation prepared for that purpose around those points, but this was not done. There was enough wire there not insulated for them to come in contact, and if they had come in contact they would simply raise the voltage of the wires that go in through Dr. Foulds' house up to 20,000, and if Mrs. Foulds had touched this lamp having a ground on the street, she would get a voltage of either 1,900 or 2,100, according to the swinging of the alternating current. The primary wires are first wrapped around the insulators on the cross-arms and then hang down a little extra length before entering the transformer, and this is also true of the secondary wires on the other side of the transformer. They hang in a loose coil before fastening on the insulators on the cross-arms, and these wires hanging there are in such a position that they could come in contact. The insulation was off from all of the wires, both the secondary and the primary. The wet weather would have no effect whatever upon this, because, if you have copper resting on copper, the resistance is practically nothing. The wind would not have very much effect upon these wires in bringing them together. It might a little, but not very much. If this increased voltage from the primary wire had gone around the transformer by these two different wires, connecting it in the way that I have stated that

they might, and got into the house, it would not have caused Mrs. Foulds' death if the primary wire had not been grounded in some way. I heard the testimony of Dr. Foulds and the other witness in regard to the accident and the circumstance attending it, and my opinion is that the cause of the accident is, there was a connection outside of the transformer, so that these wires were connected, as I have stated might have been, and the voltage in Dr. Foulds' house was 2,000 on one wire and 1,900 or 2,100 on the other, the ground being on the primary wire out in these trees, and when Mrs. Foulds touched the lamp coming in contact with one end of the wire, and as she was standing on the ground that connected the circuit, she got the voltage of 1,900 or 2,100 and was killed. I do not think the lightning could have produced this effect striking between the house and the transformer. It could not produce this effect of holding. And one reason that I do not think the lightning struck beyond the transformer on the main line that grounded on the trees, is, that if the lightning had struck further down it would have to pass the lightning arrester, and if it struck between the lightning arrester and the transformer, it would have to pass through several trees, and there are six trees between the State street line and the transformer with a number of contacts, so that it would have to pass all of these and it would have a tendency to ground. It seems to me that if the lightning had struck the wires, the path offered it down the trees is of much less resistance than the mica insulators between the two coils of the transformer, and therefore it would get to the ground by the trees. I have no interest whatever in this suit."

Cross-examination: "I merely say that there was a possibility of a contact between the primary and secondary wires at the transformer. I did not find any contact between the wires at that point when I made the test on October 1, 1896. I do not know whether there was a contact at the time of the accident or not. I do not pretend to know that. When I made this test I found a ground at certain trees. These trees began at State

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street, where the main line branches off. They were between the main line and the transformer. The ground caused by the contact of these trees would not of itself have caused the death of Mrs. Foulds."

Re-direct: "The ground by way of the trees would not have caused the death of deceased by itself, nor could it have been caused by the defect in the transformer which permitted the increased voltage to pass through it, unless the ground had been there. It took the two jointly to cause the death."

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 The primary grounds on which a reversal of the judgment is sought are stated by counsel in the form of questions, which we will endeavor to answer, so far as they are unanswered or waived. They are as follows:

"First. Does the declaration state a *prima facie* case?

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 Third. Should the instruction to find not guilty have been given, either when the case was first submitted or at the conclusion of all the evidence?

[The remaining questions relate to pleading and practice. The discussion of them by the court is omitted; also of the first question, except the following:]

When appellant wired the basement or cellar of appellee's house, and agreed to furnish him light for hire, it well knew it was dealing in an element, delivered in a current of high voltage, such as was carried on its primary wires, which was almost certain to bring death to the person who turned on the lamp, if there was a ground of the current on the circuit; hence, the law imposes upon it the duty to exercise a high degree of care and skill in the delivery of the element it had contracted for.

If the injury itself furnishes a presumption of negligence so as to require the defendant to show, by evidence, that it has been guilty of no negligence that caused it, then it logically follows that all that is necessary to be averred in the declaration to entitle the plaintiff to recover for the injury is the agreement, a

negligent breach of it and the result; also that the plaintiff has not by any neglect on his part contributed to the result. There are many cases holding this rule.

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As to the third question, we have already stated in substance at least, that when defendant put in its evidence, and the plaintiff followed it by rebutting evidence, the only question for us to consider was, whether the court erred in refusing to give to the jury defendant's renewed instruction to find for the defendant.

This was but challenging the sufficiency of plaintiff's evidence to sustain the verdict.

Besides the evidence of Dr. McRey, two extra witnesses testified that a person killed by a static discharge of electricity does not remain in the condition Mrs. Foulds did, but can be handled with safety immediately after the stroke, and there was no evidence to the contrary. There was evidence of other witnesses besides Dr. McRey, that the insulation of the primary wires at the trees back of the transformer had been worn off and that at times the trees had been on fire, but until Dr. McRey was called, no witnesses had testified that the primary and secondary wires at the transformer had been left without insulation at the place where they were liable to come in contact.

This evidence is not contradicted. It is true no witness testified to having seen the wires in contact, but the circumstances were such that unless the deceased was killed by a static discharge of lightning striking the secondary wire, her death could not be accounted for in any other way than by the coming together of the two wires, and if they were not insulated the result must have been that the current from the primary wire passed over the secondary wire, attached to which was the lamp which the deceased had hold of, and if the current from the primary wire was grounded at the trees, it passed through her body, causing her death. Absolute certainty is neither required nor expected before a fact can be said to be proven in a civil case. But

when a result is seen and facts are proven that make the result highly probable therefrom, and the result can be explained in no other way, the probability of the existence of the facts from which only the result could flow, must be deemed to be proven.

The question whether deceased met her death by a stroke of lightning coming from any place other than appellant's plant, and the question whether her death was caused through the negligence of appellant, as well as the question whether she was exercising ordinary care at the time she was killed, were all questions of fact to be found by the jury from all the evidence before them; and it would have been error for the court to have instructed the jury at the close of the evidence to find for the defendant.

We have examined the evidence with great care, and are satisfied the jury have reached a conclusion fully warranted by it.

We find no error in the record, and the judgment is affirmed. Judgment affirmed.

NOTE.—The use of the electric current for lawful purposes in the public streets is not considered so dangerous that those who use it are liable for the consequences even in absence of negligence, as for example, in the case of the explosion of dynamite (*McAndrews v. Collier*, 42 N. J. Law, 189), or the blasting of rocks in the neighborhood of a dwelling house (*Hay v. Cohoes*, 2 N. Y. 163; Wood on Nuisances, sec. 750). In such a case, where the work in the ordinary mode of doing it is a nuisance, the man who does it is liable for the consequences even though he is careful in the conduct of the work or is careful in the employment of an independent contractor (*Cuff v. Newark & N. Y. R. Co.*, 35 N. J. Law, 171). The use of the electric current for light or power may rather be classed with the cases where the article is dangerous if not carefully dealt with, and yet the dealing with it is not in itself a nuisance. In such cases, the care required is commensurate with the danger, but there is no liability except for want of such care, and the liability in such cases extends not merely to persons with whom there is an obligation by contract, but also to the public and all who, it may reasonably be anticipated, may be put in peril by the neglect. In all cases in which any person undertakes an act which, if not done with care and skill, will be highly dangerous to the persons or lives of one or more persons known or unknown, the law *ipso facto* imposes as a public duty the obligation to use such care and skill. (Per BEASLEY, C. J., in *Van Winkle v.*

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American Steam Boiler Co., 52 N. J. Law, 240, 247.) This principle has been applied to the use of loaded fire-arms (*Dixon v. Bell*, 5 M. & S. 198), explosive or highly inflammable material (*The Nitro-Glycerine Case*, 15 Wall. 524); poisonous drugs (*Thomas v. Winchester*, 6 N. Y. 397; *Perry v. Smith*, L. R. 4 C. P. Div. 325); steam boilers (*Marshall v. Welwood*, 38 N. J. Law, 339), and to persons engaged in a public employment with dangerous appliances (*Heaven v. Pender*, 11 Q. B. Div. 503; *Francois v. Cockrell*, L. R. 5 Q. B. 184, 501; *Thruswell v. Handyside*, 20 Q. B. Div. 359, 363).

The same principle was applied to the use of dangerous electric currents in the following cases: *Haynes v. Raleigh Gas Co.*, 5 Am. Electl. Cas. 264, 19 S. E. Rep. 344, 114 N. Car. 203; *Bloch v. Milwaukee St. Ry. Co.*, 5 Am. Electl. Cas. 293, 61 N. W. Rep. 1101, 89 Wis. 371; *Denver Consol. Electric Co. v. Simpson*, 5 Am. Electl. Cas. 278, 41 Pac. Rep. 499, 21 Colo. 371; *Western Union Teleg. Co. v. Thorn*, 28 U. S. App. 123, 5 Am. Electl. Cas. 283, 64 Fed. Rep. 287; *City Electric St. Ry. Co. v. Conery*, 6 Am. Electl. Cas. 217, 33 S. W. Rep. 426, 61 Ark. 381; *Atlanta Consol. St. Ry. Co. v. Owings*, 6 Am. Electl. Cas. 271, 97 Ga. 603; *Illingsworth v. Boston Elec. Light Co.*, 5 Am. Electl. Cas. 312, 37 N. E. Rep. 778, 161 Mass. 583; *Newark Electric Light & Power Co. v. Garden, Adm'r. of Mason*, 6 Am. Electl. Cas. 275, 39 U. S. App. 416, 78 Fed. Rep. 74; *Perham v. Portland Gen. El. Co.* (Oreg. 1898), 7 Am. Electl. Cas. 487; 53 Pac. Rep. 14; *Alton Ry. & Illum. Co. v. Foulds*, 7 Am. Electl. Cas. 548, 81 Ill. App. 322; *Anderson v. Jersey City El. Light Co.*, 7 Am. Electl. Cas. 557, 63 N. J. Law, 387, 43 Atl. Rep. 654.

For a discussion of this subject, see Keasbey on Electric Wires, sec. 242, *et seq.* See, also, note to *Anderson v. Jersey City El. Light Co.*, 63 N. J. Law, 387.

On the question whether the injury itself furnishes a presumption of negligence and the application of the maxim *res ipsa loquitur*, see note to *Trenton Pass. Ry. Co. v. Cooper*, *ante*, p. 446. E. Q. K.

JOHN ANDERSON V. THE JERSEY CITY ELECTRIC LIGHT COMPANY.

New Jersey Supreme Court, June 12, 1899.

(63 N. J. L. 386.)

ELECTRIC SHOCK—NEGLIGENCE—PLEADING.

(Head-note by the Court):

One who uses, controls, and manages an electric current of high destructive power, in a place where it is reasonably probable that others must

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enter to work, owes to each person who so enters a duty to use reasonable care to maintain a proper insulation of such current.

Demurrer to declaration.

The second count of the declaration is as follows: "Also for that, whereas, the said defendant, the Jersey City Electric Light Company, heretofore, to wit, on the 25th day of August, 1898, was the owner and did operate, manage, and control a certain electric light and power plant, with its machinery, poles, wires, and appliances, in the city of Jersey City, in the county of Hudson aforesaid. And whereas, the said defendant, on the day and year aforesaid, in the city of Jersey City, in the pursuit of its said business, had the management and control of a certain line of electric light and power wires extending through and along various streets in the city of Jersey City, in the county of Hudson aforesaid, and into various houses and buildings located on the line of said streets, one section or portion of which line extended through and along a certain street or avenue in said city called or known as 'Bergen Avenue,' over which said street the said line was suspended by poles, and from said poles on Bergen avenue said wires were strung or conducted to and into a certain building known as the 'Carteret Club House,' and said wires consisting of two lines of wires were strung or suspended from said line of wires to a certain light or air shaft in said Carteret Club House to a point in the easterly side of said light shaft, and were then continued in a downward course to a converter and transformer on the westerly side of said air shaft, and within a short distance of the floor or bottom of said shaft, which floor or bottom of said shaft formed the roof of the toilet room in said building, and said two wires were then turned eastwardly and southwardly and upwards into the southerly wall of said light shaft, forming a network of wires in said shaft in said building known as the 'Carteret Club House.' And whereas, the said defendant, on the 25th day of August, 1898, was accustomed, and for a long space of time theretofore, to wit, for the space of two years, had been accustomed, to use said line of wires for the pur-

poses of furnishing light and power to buildings and manufactories in said city of Jersey City by electricity, and to that end was accustomed, and for the said space of time had been accustomed, to pass and did pass through said line of wires, and through each and every wire of said line in said air shaft, a strong and powerful current of electricity, dangerous to the life of any human being who might come in contact therewith. And the plaintiff avers that at the time the defendant so placed its wires in said light shaft of said Carteret Club House it well knew it would be necessary for mechanics and others to enter and work therein, in and about the care and repair of said light shaft, and that it was the duty of the said defendant to keep the said wires safely, securely, and completely insulated, so that workmen and others lawfully entering in and upon said light shaft should not be injured by contact therewith; but that the said defendant, notwithstanding such knowledge, and disregarding its said duty in the premises, carelessly and negligently maintained the said wires, and carelessly and negligently protected the same by defective insulation, and carelessly and negligently failed to protect and cover said wires with safe or sufficient insulating material, and carelessly and negligently permitted the covering used thereon to become worn, defective, and wholly insufficient to render them safe to persons coming in contact therewith. And the plaintiff further says that on the day and year aforesaid, at Jersey City, in the county of Hudson aforesaid, while the said plaintiff was lawfully engaged at work in repairing and refitting the said air shaft, he, the said plaintiff, came in contact with one of the said wires without any fault, carelessness, or negligence on his part, and thereby received said current into his body, through and by means of which he, the said plaintiff, was greatly shocked, burned, hurt, and wounded, maimed, sick, sore, and disordered, and so remained and continued for a long space of time, to wit, from thence hitherto, during all which time he was hindered and prevented from performing and transacting his lawful affairs and business

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during that time to be done and transacted, and will continue so for the remainder of his life, and also was forced to pay, lay out, and expend a large sum of money, to wit, the sum of one thousand dollars, in and about endeavoring to be healed of his burns, wounds, sickness, and disorder, and in caring for himself, to wit, at Jersey City aforesaid. Wherefore, and by reason of the premises, he, the said plaintiff, saith that by the wrongful acts, omissions, and negligence of the said defendant, the said plaintiff is injured and hath sustained damage in the sum of twenty thousand dollars, and therefore he brings his suit," etc.

Before MAGIE, C. J., and GARRISON, LIPPINCOTT, and COLLINS, JJ.

Joseph Anderson, for plaintiff.

Flavel McGee, for defendant.

GARRISON, J.: The second count of the declaration, to which a general demurrer has been filed, is, in my opinion, good. It sets out facts from which a duty arose from the defendant to the plaintiff, and negatives the performance of that duty. In fine, the demurrer establishes this state of facts, viz.: That the defendant used for its purposes wires that it had placed in a light shaft, where it knew that the class of laborers to which the plaintiff belonged would enter to work; that these wires were under the control and management of the defendant, who passed through them a current of electricity dangerous to a human being; and that it failed to maintain a proper insulation of this current, whereby plaintiff, while working in the shaft, was injured.

Now, the elemental rule is that whoever uses a highly destructive agency is held to a correspondingly high degree of care. Care, in this sense, means more than mere mechanical skill; it includes circumspection and foresight with regard to reasonably probable contingencies.

The demurrer admits, in effect, that the defendant knew that the plaintiff would enter the shaft, and work in the vicinity of

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its wires, and that it did not use reasonable care to render them safe in view of their location, whereby the plaintiff was injured.

A good cause of action is thus stated, and the demurrer is overruled.

NOTE 1.—When this case came on for trial it was proven that the plaintiff touched the wire voluntarily, after being informed that it was not properly insulated, for the purpose of demonstrating that it was safe. The trial court granted a non-suit, upon the ground of contributory negligence; and the judgment was affirmed by the Court of Errors and Appeals (46 Atl Rep 593).

NOTE 2.—A distinction is to be noted between this case and *Newark El. L & P. Co. v. McGilvery*, 7 Am. Electl. Cas. 529, 62 N. J. Law, 451. 41 Atl Rep 955. In the latter case it was held that the company was not liable to one who himself broke down an electric light wire and was afterwards injured by a new current sent through the wire without notice. The court said that as to persons passing along the street the electric light company owed a duty to refrain from sending a current through the wires until it was ascertained that it was safe to do so, but that to one who had taken part in breaking down and exposing the dangerous wire and who afterwards meddled with it the company owed no duty until he had given them notice that the wire was broken.

There are limits to the liability of the owner of dangerous premises to those who come upon them and distinctions are made between trespassers, mere licensees and persons who come by express or implied invitation. *Indermann v. Dawes*, L R, 1 C. P. 274; *Corby v. Hill*, 4 C. B. N. S., 556; *Wright v. London & N. W. Ry Co.*, 1 Q. B. Div. 252; *Sweeney v. Old Colony R. Co.*, 10 Allen, 368; *Phillips v. Library Co.*, 56 N. J. Law. 307; *Reich v D., L. & W E. Co.*, 61 N. J Law, 338; Bigelow on Torts, 697-701; Pollock on Torts, 415; *Hounsel v. Smyth*, 7 C. B. N. S. 731; *Gantrel v. Egerton*, L. R. 2 C. B. 371; *Gallagher v. Humphrey*, 6 Law Times Rep N S 684; 2 Nims & Smith Sel. Cas. on Torts. 288; but the liability for injury from the escape of the electric current arises out of the fact that the force used is so extremely dangerous that special care is required to keep it from doing harm. It is a concealed danger and injury done by reason of neglect of proper precautions may be a positive tort without reference to the relations between the parties, and there may be liability for negligence in letting the current escape, if any one is injured who is using due care and is not in fault toward the defendant, and whose injury may reasonably be anticipated. Keasbey on Electric Wires, sec. 249. The duty of one who uses such a force may be compared to that of one who keeps a ferocious beast, who is

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bound at his peril not to let it escape, or that of one who stores up water for his own purposes and is bound to keep it in or at least to take great care that it does no harm. *Ibid.* *May v. Burdett*, 9 Q. B. 101; *Atlanta Consol. St. Ry. Co. v. Owings*, 6 Am. Electl. Cas. 271; *Fletcher v. Rylands*, L. R. 1 Exch. 267, L. R. 3 H. L. 330; *National Bell Teleph. Co. v. Baker* (1893), 2 Ch. 183; *Longmead v. Holliday*, 20 Law Jour. Ex. at page 433; *Heaven v. Pender*, 11 Q. B. Div. 503, 509; *Thornesell v. Handyside*, 20 Q. B. Div. 359, 363; *Van Winkle v. Amer. Steam Boiler Co.*, 52 N. J. Law, 240, 19 Atl. Rep. 472. The following are some of the cases on the subject relating to electric wires: *Clements v. Louisiana El. Lt. Co.*, 4 Am. Electl. Cas. 381, 44 La. Ann. 692, 11 So. Rep. 51; *McLaughlin v. Louisville El. Light Co.* (Ky. 1890), 6 Am. Electl. Cas. 355, 37 S. W. Rep. 851; *Atlanta Consol. St. Ry. Co. v. Owings*, 6 Am. Electl. Cas. 271, 97 Ga. 663, 25 S. E. Rep. 377; *Sullivan v. Boston & Alb. R. R. Co.*, 156 Mass. 378, 31 N. E. Rep. 128; *Illingsworth v. Boston El. Light Co.*, 5 Am. Electl. Cas. 312; 161 Mass. 583, 37 N. E. Rep. 778; *Hector v. Boston El. Light Co.*, 5 Am. Electl. Cas. 300, 161 Mass. 558, 37 N. E. Rep. 733; *Hector v. Boston El. Light Co.*, 7 Am. Electl. Cas. 568, 174 Mass. 212, 54 N. E. Rep. 539; *Griffin v. United El. Light Co.*, 6 Am. Electl. Cas. 252, 164 Mass. 492, 41 N. E. Rep. 675; *Overall v. Louisville El. Light Co.* (Ky. 1899), 7 Am. Electl. Cas. 521, 47 S. W. Rep. 442; *Newark El. Light Co. v. Garden, Adm. of Mason*, 6 Am. Electl. Cas. 275, 39 U. S. App. 416, 78 Fed. Rep. 74; *Perham v. Portland Gen. Electl. Co.*, 7 Am. Electl. Cas. 487, 33 Oreg. 451, 53 Pac. Rep. 14; *Alton Ry. & Illum. Co. v. Foulth*, 7 Am. Electl. Cas. 548, 81 Ill. App. 322; *Haynes v. Raleigh Gas Co.*, 5 Am. Electl. Cas. 264, 114 N. Car. 203, 19 S. E. Rep. 344; *Bloch v. Milwaukee St. Ry. Co.*, 5 Am. Electl. Cas. 293, 89 Wis. 371, 61 N. W. Rep. 1101; *Denver Consol. Elec. Co. v. Simpson*, 5 Am. Electl. Cas. 278, 21 Colo. 371, 41 Pac. Rep. 499; *Western Union Teleg. Co. v. Thorn*, 5 Am. Electl. Cas. 283, 84 Fed. Rep. 287, 28 U. S. App. 123; *Giraudi v. Electr. Imp. Co.*, 5 Am. Electl. Cas. 318, 107 Cal. 120, 40 Pac. Rep. 108; *City Elec. Co. v. Conery*, 6 Am. Electl. Cas. 217, 61 Ark. 381, 33 S. W. Rep. 426.

For reference to other cases on this subject, see Keasbey on Electric Wires, sec. 248 and note.

For a discussion of the liability of the electric company to its servants, see Keasbey on Electric Wires, secs. 255-263. E. Q. K.

SARAH K. DEVLIN ET AL. v. BEACON LIGHT COMPANY.

Pennsylvania Supreme Court, July 19, 1899.

(192 Pa. 188.)

FALLEN ELECTRIC WIRES—DEGREE OF CARE—CONTRIBUTORY NEGLIGENCE.

An electric light company which, in making alterations in its line, allows an arc wire to lie upon the pavement in a much-traveled part of a city without guard or warning to passers-by, is *prima facie* negligent.

It is a question for the jury whether a passer-by who trod upon such wire was guilty of contributory negligence.

Appeal by plaintiffs from a judgment of nonsuit of the Court of Common Pleas of Delaware County.

V. Gilpin Robinson and John E. McDonough, for appellants.

O. B. Dickinson, for appellee.

STERRETT, C. J.: In 1897 two actions of trespass were brought against the defendant company,—one by Sarah K. Devlin, by her father and next friend, to recover damages for injuries she sustained by being brought in contact with a live electric light wire which was negligently left upon the sidewalk in the city of Chester by defendant company's employes while they were engaged in readjusting the wires used for public street lighting; and the other, by her parents, James K. and Sarah Devlin, to recover damages sustained by them in consequence of their daughter's injury. Before trial these cases were consolidated, by order of court, under the provisions of the Act of May 12, 1897. On the trial the joint plaintiffs were nonsuited by the learned trial judge for the reason given by him in the concluding sentence of his charge, viz.: "The plaintiff either saw the dangerous

wire and trod upon it, or was negligent in failing to see it; and in either case, having contributed to the accident, we must direct the entry of a compulsory nonsuit." Doubtless, for the same reason,—because there is no possible ground for any other,—he afterwards denied the motion to take off the nonsuit. Hence this appeal by the plaintiffs. The specifications of error, so far as relevant, are directed to the court's action in refusing to take off the judgment of nonsuit. It was not denied, nor could it be with any reasonable hope of success, that the evidence tended to prove that the defendant company was grossly negligent in leaving the wire in a position where it was liable to come in contact with other wires heavily charged with electricity, and thus endanger the lives of unsuspecting pedestrians and others passing and repassing along and across the public street. One of the two reasons assigned in support of the motion for a nonsuit was, "Because plaintiffs failed to prove negligence upon the part of the defendant." This was wholly unwarranted by the testimony, and the learned trial judge rightly disposed of it by saying: "The evidence showed that the defendant in making some alterations in its line allowed an arc wire to lie upon the pavement in a much-traveled part of the city without guard or warning to passers-by; that the plaintiff stepped upon it, and immediately received a shock that felled her to the ground, and occasioned the injuries of which she complains. This, in our judgment, was sufficient to establish the negligence of the defendant in the first instance, and require it to make answer."

As to the alleged contributory negligence of the injured plaintiff, it is sufficient to say that a careful consideration of the testimony has satisfied us that the learned court below erred in denying the motion to take off the judgment of nonsuit. While there is some evidence bearing on the subject of contributory negligence that may be regarded as sufficient to go to the jury, it is not of such a character as to justify a trial judge in holding, as matter of law, that, because of the plaintiff's contributory negligence, there can be no recovery. In order to reach that conclu-

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sion, resort must be had to inferences of fact such as can be legally drawn only by a jury. We are of opinion that the legal conclusion of contributory negligence is unwarranted by any of the admitted or conclusively established facts in this case. In other words, upon the evidence before us, the case should be properly submitted to and disposed of by a jury, and not by the court alone. Inasmuch as the case goes back for trial by a jury, further comment on the questions involved is neither necessary nor desirable. Judgment reversed, motion to take off nonsuit granted, and record remitted with a *procedendo*.

NOTE.—See Mr. Keasbey's note, *ante*, p. 446.

MARY E. FITCH, Respondent, v. THE CENTRAL NEW YORK
TELEPHONE AND TELEGRAPH COMPANY, Appellant.

New York Supreme Court, Appellate Division, Third Dept., July, 1899.

(42 App. Div. 321.)

DEATH BY ELECTRIC SHOCK—UNAVOIDABLE ACCIDENT.

On March 27th, a tree, uprooted by a high wind, dragged from its pole one of defendant's telephone wires, but held it so high above the road as not to interfere with travel. On the 28th an employe of the overseer of highways removed the fallen tree and fastened the wire to another tree, still out of reach of travelers. On the 31st, the wire came in some way nearer the ground and collided with and overturned plaintiff's top carriage. The place was about four miles from each of the two villages connected by the telephone line. There was no interruption of the circuit, and the defendant had no knowledge or notice of the occurrence until about the time of the accident, when the line was promptly repaired.

Held, that the accident could not have been anticipated, and could have been guarded against only by constant patrol of the lines, which was not required of the company.

Judgment for plaintiff reversed.

Appeal by defendant from judgment entered upon the verdict of a jury at Chenango County Trial Term.

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Facts sufficiently stated in head-note and opinion.

Albert F. Gladding, for the appellant.

John W. Church, for the respondent.

HERRICK, J.: Under section 102 of chapter 566 of the Laws of 1890 the defendant had a right to have its lines of wire upon, over or under the highway, and, therefore, cannot be treated as a trespasser.

The falling of the wire did not happen because of faulty construction, or any inherent weakness in its poles, or in the attachment of the wire thereto, which rendered it unable to resist a wind storm, but it was carried down by a tree which was uprooted and fell upon it. The defendant did not in fact know of the injury to its lines until the morning of, and about the time of, the happening of the accident to the plaintiff; it then promptly proceeded to repair it. The only claim of negligence that can be made against the defendant, it seems to me, is in not discovering and repairing the injury to its line between the time of the happening of that injury and the time the accident happened. Is that claim well founded?

It is evident that, under ordinary circumstances, when the wires are torn from the poles, notice will be given of the fact by their dropping to the ground and causing an immediate interruption of the current, and the consequent cutting off of communication over the wire, thus immediately giving notice to the company. Here, from the peculiar and unusual nature of the accident, the wire after being torn from its pole, was not only held from the ground so as to prevent the current from being cut off, but it was held at such a distance above the highway as not to interfere with the traffic over it, and consequently no notice was received in the ordinary way by the defendant; and when it was removed from the fallen tree and attached to another, it was still in such a position that the current was not interrupted, nor did the wire itself interrupt or interfere with passers-by on the highway.

The peculiar character of this accident to the wire of the defendant, and its attendant circumstances, are of such a nature as not to have been reasonably anticipated by the defendant, and, therefore, it was not called upon in the exercise of reasonable diligence to guard against them.

While the defendant might reasonably anticipate that its wires might become broken or dislodged, it also could reasonably anticipate that it would have prompt and immediate notice of that fact by the interruption of the communication; it could not reasonably anticipate the uprooting of trees, and their falling upon their wires, and yet holding them up from the ground in such a manner as not only to prevent the breaking of the current, but also not to interfere with the passers-by, and thus prevent notice being given; nor could it reasonably apprehend the happening of accidents of like character, and, therefore, it was under no obligation to adopt a system of supervision and inspection to guard against such unanticipated and unforeseen dangers.

It is one of those accidents that probably could not be guarded against, except by a constant patrol or inspection of the lines, and it seems to me that telephone and telegraph companies are under no greater obligations in that respect than are overseers or commissioners of highways, and as to them, it has been held that they are under no obligation to keep the roads in their towns under constant personal supervision. *Lane v. Town of Hancock*, 142 N. Y. 510.

I cannot find from the evidence that the defendant is chargeable with negligence, and the judgment and order should, therefore, be reversed, and a new trial ordered, costs to abide the event.

All concurred, except MERWIN, J., dissenting, and PUTNAM, J., not sitting.

Judgment and order reversed and a new trial granted, costs to abide the event.

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ALBERT E. HECTOR v. BOSTON ELECTRIC LIGHT COMPANY.

Massachusetts Supreme Judicial Court, Sept. 7, 1899.

(174 Mass. 212.)

INJURY FROM ELECTRIC SHOCK.

New evidence held to warrant no change of decision or modification of views expressed upon former appeal, 5 Am. Electl. Cas. 300.

Appeal by plaintiff from order of Superior Court, Suffolk County, directing verdict for defendant.

S. L. Whipple and W. M. Noble, for plaintiff.

E. W. Burdett and C. A. Snow, for defendant.

MORTON, J. : After the former decision in this case, reported in 161 Mass. 558, the plaintiff amended his declaration by adding an allegation that the defendant was wrongfully maintaining its wires over 41 Temple Place, without any right or possession from the owners or occupants thereof, and went to trial on the declaration as thus amended. At the conclusion of the plaintiff's evidence the learned chief justice of the Superior Court ruled that the plaintiff could not recover, and directed a verdict for the defendant. The case comes here now on the plaintiff's exceptions to this ruling and order. The plaintiff contends that the evidence at the last trial differed favorably to him in material respects from what it was at the former trial, and therefore that the grounds on which the court decided that case are not applicable to this. But, while it is true that there are some differences, we do not think that they affect the substantial grounds on which the decision in that case was placed. Those grounds were, in brief, that the defendant owed no duty to the plaintiff

to have its wires properly insulated at the place where he was injured, or to have them supported so far above the roof of No. 41 that the plaintiff would not come in contact with them, and that the defendant was not required, for the protection of the servants of the telephone company, to maintain an effectual insulation of its wires over other buildings than that on which the standard was placed at places where the defendant had no reason to expect that they would go in using its standard, and where the defendant had neither invited nor licensed them to go. It was assumed in the opinion that the defendant had permitted the telephone company to use its standard on building No. 45 Temple Place, and that the plaintiff, as the servant of that company, had an implied license, through the defendant, from the owner or occupant, to go upon the roof of No. 45, and attach telegraph and telephone wires to the standard. The fact, if it was a fact, that the right of the telephone company to attach its wires to the standard was somewhat greater than it was there assumed to be, does not affect the principle on which that case was decided. That case turned, not on the nature of the right which the telephone company had to attach its wires to the standard, but on the duty, if any, which the defendant owed to the plaintiff at the place where he was injured. Neither, we think, for the same reason, does it make any difference that the plaintiff was not sent to attach a wire to the standard on No. 45 Temple Place, but was sent over into Temple Place to find a suitable route, and a suitable series of fixtures for the wire that was to be run; nor that he was not stooping under a group of wires when hurt; nor that the defendant, not long before the accident to the plaintiff, had acquired a joint interest with the telephone company in the fixture on building No. 34 Temple Place. The plaintiff does not contend, as we understand him, that there was any evidence tending to show that the defendant wrongfully maintained its wires over No. 41 Temple Place. The most that he contends for in that regard is that its rights were no greater than those of the telephone company to maintain its wires over

the same building. He assumes, and, we think, rightly, upon the evidence, that the telephone company and the defendant company both maintained their wires over building No. 41 by implied permission of the owners or occupants of that building; in other words, that they were licensees. This was, in substance, the situation at the former trial, though it was not brought out so sharply perhaps.

The matters most strongly urged as new, or as not developed at the former trial, consist of evidence tending to show that there had been a joint use, to a greater or less extent, prior to the accident, by the defendant and the telephone company, of structures throughout the city, the structures sometimes belonging to one and sometimes to the other; that the telephone company had so used the standard belonging to the defendant on the building No. 45 Temple Place; that linemen in the discharge of their duties go everywhere upon roofs where there are wires, and from roof to roof, as may be necessary, to reach a particular fixture, though whether with or without the permission of the owners or occupants of the buildings did not appear; and that the alternating wires which were strung from the fixture on the building No. 45 Temple Place to that on No. 34 Temple Place, and from one of which the plaintiff received the shock which caused the injury, had been strung only a short time before the accident, and were among the telephone wires which had been there a long time. This evidence was material only as tending to show that the defendant had reasonable cause to expect that the plaintiff would approach the fixture on No. 45 at the place and in the manner in which he was approaching it when he was injured, and had invited or licensed him to go there for the purpose of attaching the telephone wire to that fixture. The evidence failed to show that. There was nothing tending to show that the defendant invited or licensed the plaintiff to go everywhere over the roofs in the city where there were wires, or that it had any authority to do so. It was not enough to show that the defendant had reasonable cause to expect that the plaintiff, in the discharge of his

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duties, would go, rightly or wrongly, upon roofs covered by its wires. The plaintiff was bound to go further, and show that the defendant had invited or licensed him to go where he was when he was injured. It was held in the former opinion that it was not the duty of the defendant to have its wires properly insulated over their whole circuit, or to have them placed so far above the roofs of buildings which they covered that the plaintiff and other linemen would not come in contact with them. It limited the duty and liability of the defendant to cases in which it had permitted or licensed the telephone company to use its fixtures, and to places where it had reasonable cause to expect that the servants of the telephone company would go in the discharge of their duties in connection with wires attached to defendant's fixtures, and to which it had invited or licensed them to go. And, as applied to the evidence now before us, we see no reason to modify or change the views then expressed, and no ground on which the defendant can be held liable.

We have not considered the question of due care on the part of the plaintiff. We doubt whether a finding that he was in the exercise of due care would be warranted. The view which we have taken of the effect of the former decision renders it unnecessary, however, to consider that question. Exceptions overruled.

**JOHN A. SCHWEITZER'S ADMINISTRATOR V. CITIZENS' GENERAL
ELECTRIC COMPANY.**

Kentucky Court of Appeals, Sept. 29, 1899.

DEATH BY ELECTRIC SHOCK—DEGREE OF CARE.

It is not sufficient, in an action based on death by electric shock, to charge the jury that it was the duty of the company maintaining the wires, contact with which caused the accident, to observe the highest degree of care and skill usually exercised by prudent persons engaged

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in the same or similar business, to keep its wires so insulated as to be reasonably safe and free from danger to persons who may come in contact with them. The law requires perfect protection at points where contact is likely to take place.

Cases of this series cited in opinion: *Overall v. Louisville Elec. L. Co.*, vol. 7, p. 521; *McLaughlin v. Louisville Elec. L. Co.*, vol. 6, p. 255.

Appeal by plaintiff from judgment of Circuit Court, Jefferson County.

Prior, Oneal & Pryor, and *Kohn, Baird & Spindle*, for appellant.

Baker & Woods, for appellee.

GUFFY, J.: It is alleged in the petition that while decedent was engaged in the prosecution of his lawful and necessary affairs, exercising due care for his own safety, in making repairs upon electrical fixtures in a certain building and storeroom occupied by one Swift, the defendant, its agents, servants, and employes, by gross carelessness and negligence and wrongful act, allowed, permitted, and suffered a dangerous and powerful current and force of electricity to escape from the wires and conduits of said defendant into said building and storeroom, and to be conducted through and over said building, from which the said decedent was killed. The decedent was not in the employment of defendant. Judgment was prayed for in the sum of \$25,000. The first paragraph of the answer is a traverse of the averments of the petition in so far as negligence or wrongful act of defendant is charged. The second paragraph pleads contributory negligence of the deceased. The reply traversed the affirmative allegation of the answer. A trial resulted in a verdict and judgment in favor of the defendant, and, plaintiff's motion for a new trial having been overruled, he prosecuted this appeal.

We deem it unnecessary to notice in detail all the grounds relied on for a new trial.

No witness should have been allowed to give an opinion as to the cause of the injury or the condition of the electrical apparatus, unless he had first shown himself an expert, and also had sufficient knowledge of the facts connected with the appliances used to enable him to form an intelligent and reliable opinion.

Appellant complains of instructions Nos. 4, 5 and 6, which instructions are as follows: "(4) The court instructs the jury that the defendant owed the duty to the plaintiff's intestate to exercise the utmost care and skill which prudent persons would exercise under similar circumstances, in the management and care of its wires, appliances, and electrical currents, so as to prevent the entry into the building where the plaintiff's intestate was killed of any electrical current that was more dangerous than necessary to reasonably conduct its business of lighting said building and operating motor; and the failure to exercise such care is, in law, negligence. (5) By 'negligence' is meant the failure to exercise that degree of care which a person of ordinary care and prudence usually exercises under like or similar circumstances. (6) The court instructs the jury that if they believe from the evidence that there was on the morning of the accident and at the time of the accident, a foreign and dangerous current, without the fault of the defendant company, and that said foreign current caused the death of decedent, the law is for the defendant, and the jury must so find."

It may well be doubted whether there was sufficient evidence, if any, to authorize the giving of instruction 6; and, if there was any evidence tending to show that any foreign current was on the lines, it was error to point out or call attention to such evidence. The reference to such a matter was likely to lead the jury to the conclusion that in the opinion of the court such evidence had been produced, and was entitled to much weight. The defendant could not be held liable unless it was guilty of negligence in some respect, and a general instruction to that effect was sufficient.

Appellant insists that instruction No. 5 is erroneous, and that

it, in effect, destroyed No. 4. It is contended that the law is that the defendant was bound to use the highest degree of care that skillful and prudent men would use, or ought to use, in the same or similar business. It cannot be doubted that electricity is a powerful and dangerous force, and a force no one except experts can understand. The danger incident to electric currents and appliances can rarely, if ever, be foreseen or guarded against by the common citizen; hence the highest degree of care should be exercised by those using such a deadly and unseen force for private gain. Such seems to be the general doctrine, as found in the books and in the opinions of the courts of last resort, including this court. In *Overall v. Louisville Elec. Light Co.*, 7 Am. Electl. Cas. 521, 47 S. W. 443, this court said: "Appellant, at the time he was struck, was in a place where his business required him to be, and where he had a right to be; and it was the duty of the electric light company to know that linemen of the telephone company would have to come into close proximity to its wires in attending to their duties, and it was its duty to use every protection which was accessible to insulate its wires at that point, and at all points where people have a right to go for business or pleasure, and to use the utmost care to keep them so, and for personal injuries resulting from its failure in that regard it is liable in damages." Mr. Thompson, in his work on Electricity (sec. 65), says: "It may be doubted whether persons or corporations employing for their own private advantage so dangerous an agency as electricity ought not to be regarded as *quasi* insurers, as towards third persons, against any injurious consequences which may flow from it. It may be doubted whether one who collects, or, rather, creates, so dangerous an agency, ought not to be held to the obligation of restraining it,—that is, of insulating it,—at his peril." And in the recent case of *McLaughlin v. Louisville Electric Light Co.*, 6 Am. Electl. Cas. 255, 37 S. W. 856, this court says: "It seems clear to us that appellee should have been required to have had perfect protection on its wires at the point and place where appellant was

injured. The fact that it was very expensive or inconvenient is no excuse for such failure. 'Very great care' might be sufficient as to the wires at points remote from public passways, buildings, or places where persons need not go for work or business; but the rule should be different as to points where people have a right to go for work, business, or pleasure.

At the latter points or places insulation or protection should be made perfect, and the utmost care used to keep it so." And this doctrine has been laid down in a number of well-considered opinions cited in this opinion, *supra*. Electricity is the most powerful and dangerous element known to science. It cannot be seen, and it is as silent as it is deadly, and it follows that those who manufacture and use it for private advantage must do so at their peril. The only way to prevent accidents, where a deadly current is used, is to have perfect protection at those points where people are liable to come in contact with it. And the jury in this case should have been instructed that this was the duty of the defendant. To have told them "that it was the duty of the defendant to observe the highest degree of care and skill usually exercised by prudent persons engaged in the same or similar business, to keep its wires so insulated as to be reasonably safe and free from danger to persons who might come into contact with them," was not sufficient. The law requires, at those points where such contact is likely to take place, perfect protection from this unseen and terrible power.

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NOTE.—See Mr. Keasbey's note, *ante*, p. 561.

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PHILIP A. BROWN, Infant, by Next Friend, v. EDISON ELECTRIC
ILLUMINATING COMPANY OF BALTIMORE CITY.

Maryland Court of Appeals, Jan. 9, 1900.

(90 Md. 400.)

ELECTRIC SHOCK—NEGLIGENCE IN CARE OF ELECTRIC LIGHT WIRES.

An electric light company, using a current so powerful that its wires are highly dangerous, owes a duty of protection to every one who in the exercise of a lawful occupation, in a place where he has a legal right to be, is liable to come in contact with the wires. So held, where a boy was injured by contact with an uninsulated primary wire, while he was on a window-roof in front of his employer's store, attempting to remove an obstruction from a spout.

Cases of this series cited in opinion: *W. U. Tel. Co. v. State to Use of Nelson*, vol. 5, p. 619; *Ennis v. Gray*, vol. 5, p. 325; *Griffin v. United Elec. L. Co.*, vol. 6, p. 252; *Overall v. Louisville Elec. L. Co.*, vol. 7, p. 521; *Perham v. Portland Gen. Elec. Co.*, vol. 7, p. 487.

Appeal by plaintiff from judgment of Baltimore Court of Common Pleas.

William Colton and H. Tebbs, for appellant.

John P. Poe, C. Hopewell Warner and Edgar Allen Poe, for appellee.

SCHMUCKER, J.: The action in this case was brought against the appellee for damages sustained by the equitable appellant from coming in contact with an electric light wire charged with a high-tension current. The evidence introduced by the plaintiff tended to prove the following state of facts: The equitable appellant, who, at the time of receiving the injury complained of, was a boy 11 years old, was employed by one Burt, the proprietor of a

store at No. 314 West Pratt street, Baltimore, to clean up the store and discharge other minor duties. There was a roof, covering the front window to the store, about 2 feet 6 inches wide, which extended across the entire front of the building just below the second story window. An open rain spout or gutter ran along the front edge of this roof, and discharged its contents by a down spout attached to the front of the building. The electric light current was introduced to the store by two primary wires extending from a pole, standing some 75 feet easterly from the building, to glass insulators which were attached by iron brackets about 6 inches long to the easternmost end of the small roof of which we have spoken. From the insulators the wires passed into a fuse box, and then into a converter, from which the current was carried by secondary wires into the store. The primary wires from the pole to the converter were charged with a current of 1,000 volts, which is highly dangerous, if not fatal, to the life of any one coming in contact with the naked wire; but the secondary wires, extending from the converter into the store, were only charged with the comparatively harmless current of 50 volts. The primary wire from the pole to the insulator nearest the house, and not more than 6 inches from it, was jointed just beyond the insulator, and at the time of the accident the point of the jointed wire was left sticking up and entirely uncovered. The same wire was exposed naked by reason of defective insulation at two other places about 2 or 3 inches beyond the insulator. On June 5, 1897, the equitable appellant, by direction of his employer, went upon the roof which covered the store window, for the purpose of cleaning it and the rain spout attached to it. He was seen by a passer-by on his knees upon the roof, apparently cleaning the gutter; and shortly afterwards he was found lying insensible upon the roof, with his head in contact with the exposed joint in the primary electric light wire, nearest to the house. The flesh of his head was burning at the point of contact with the wire when he was found, and he was otherwise injured by the electric current which passed into his body from

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the wire. No one witnessed the accident, but the appellant himself testified that he was stooping over the edge of the roof at its eastern end, resting on his left hand, while endeavoring with his right hand to remove a ball which had lodged in the down spout, when his left hand slipped and he immediately became unconscious. There was also evidence tending to show that the primary wire, which was constantly charged with the deadly current, was not covered with the most approved and effective insulating material, even where it ran in close proximity to the front of the house. At the conclusion of the plaintiff's testimony, the court, upon application of the defendant, took the case away from the jury on the ground that there was no legally sufficient evidence to entitle the plaintiff to recover.

The appellee was engaged in supplying electric light to streets and houses by means of a current of so high voltage that the business in which it was thus engaged was in the highest degree dangerous to all persons liable to come in contact with the wires which carried the current. These wires were strung on poles erected in the streets of a large city, which were likely to be at all times occupied, and at many times crowded with persons lawfully passing through them. The same dangerous current was in the course of the business conducted by wires strung from the poles standing along the curbstone, across the sidewalk, to the houses to be lighted by it. Outside of any contractual relation between the parties to this suit, the very nature of the business thus conducted by the appellee imposed upon it a legal duty towards every person who, in the exercise of a lawful occupation in a place where he had a legal right to be, was liable to come in contact with the wires charged with this invisible but deadly power. This duty has been recognized and enforced by the courts in many cases in this State and elsewhere. As applied to the management by the appellee of its wires charged with the high-tension current, this legal duty would require it to see that its wires, when strung where persons were liable to come in contact with them, were properly placed with reference to the safety

of such persons, and were properly insulated. *W. U. Tel. Co. v. State, to Use of Nelson*, 5 Am. Electl. Cas. 619, 82 Md. 311; *Ennis v. Gray*, 5 Am. Electl. Cas. 325, 87 Hun, 356; *Griffin v. Light Co.*, 6 Am. Electl. Cas. 25, 164 Mass. 492; *Mackay v. Railroad Co.*, 35 N. Y. 75; *Overall v. Louisville, etc. Light Co.* (Ky.), 47 S. W. 442; *Perham v. Portland Electric Co.* (Or.), 7 Am. Electl. Cas. 487, 53 Pac. 14; *Reagan v. Light Co.*, 167 Mass. 406. In the present case the wire charged with the deadly current was carried by the system of construction adopted by the appellee to within six inches of the front of the house to be lighted, and was then attached to an insulator quite near the bottom of the easternmost second-story window, and but a few inches from the end of the roof on which the appellant was injured. In view of the number of lawful purposes, such as painting, repairing, and cleaning, for which persons might be required to labor upon the roof in question, or upon the front of the house or of the adjoining house, the propriety of bringing the high-tension wire so near to the house may well be questioned. The evidence indicated that the converter which reduced the strength of the current, and robbed it of its fatal character, might have been placed upon the pole, and a low-tension and harmless current have been carried from the pole to the house. If the witnesses are to be believed, the insulation of the high-tension wire at the time of the accident was defective at several places within less than one foot from the front of the house. The evidence is that the exposed point on which the appellant was injured was not over seven inches from the roof on which he was working. In *Nelson's Case*, *supra*, where the defective insulation of an electric supply wire permitted an unused telephone wire, which fell across it and reached the pavement, to become so heavily charged with electricity that it killed a child on the street who came in contact with it, we held that it was the plain duty of the company not only to properly erect their plants, but to maintain them in such condition as not to endanger the public. We also held in that case that if the property of the de-

fendant was not in proper condition, and by reason thereof the plaintiff was injured, those facts alone, in the absence of other evidence to show that the defect originated without the fault of the company, afford a *prima facie* presumption of negligence. The doctrine there announced applies with equal force to the present case.

There were no eye-witnesses to the occurrence of the accident, and the appellee strongly contended that the evidence failed to show that either the condition or the arrangement of the wires was the cause of the injury to the appellant, and relied in that connection on *Abbott's Case*, 75 Md. 158; *Savington's Case*, 71 Md. 599, and *Millslagle's Case*, 73 Md. 75. An examination of those cases show that there is a plain distinction between them and the one under consideration, in this: that no one of those cases presented such a *prima facie* presumption of negligence against the defendant as the present one does. In *Abbott's Case* there was no evidence at all of negligence on the part of the defendant. In each of the other cases the person killed was a trespasser on the track of the railway by whose train he was struck. In *Millslagle's Case* there was also some evidence indicating that the boy who was killed had attempted to board the cars while they were in motion, and the condition of the body when found gave color to that view of the case. And in *Savington's Case* there was evidence tending to show that the boy who was killed stumbled and fell against the pilot of the engine while running between the north and south tracks of the railroad. In the case at bar the boy was engaged in a lawful occupation at a place where he was entitled to be when he was injured, and there is no evidence showing a want of care on his part. If his own evidence is to be believed, the injury would not have occurred if the wires of the appellee had been properly insulated, or if the high-tension current had not been brought so near to the house. We think the case presented such strong *prima facie* evidence of negligence on the part of the appellee that it should not have

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been taken from the jury. Judgment reversed, and cause remanded.

NOTE.—See Mr. Keasbey's notes, *ante*, pp. 556, 561. Also note 2 at end of Part III.

EDWARD J. WITTLEDER, an Infant, by EDWARD G. WITTLEDER, his Guardian ad Litem, Respondent, v. THE CITIZENS' ELECTRIC ILLUMINATING COMPANY OF BROOKLYN, Appellant.

New York Supreme Court, Appellate Division, Second Department, January, 1900.

(47 App. Div. 410.)

INJURY BY SHOCK FROM ELECTRIC LIGHT WIRE.

Defendant's electric light wires, strung upon the structure of an elevated railroad, were so near a landing of a stairway leading to a station of the railroad, that the plaintiff, inadvertently throwing his hand backward from the railing, touched a live wire and received injuries by shock and burning.

Held, that though the plaintiff was not an intending passenger, but was a boy playing on the stairway, he was not a trespasser, at least upon any rights of the defendant, since it did not appear that the defendant had a right to string its wires there.

Under a complaint which alleged facts showing both negligence and nuisance, *held*, that recovery might be had upon either theory, there being no motion to compel the plaintiff to elect.

Held, impossible to find, as matter of law, that the defendant could not reasonably have anticipated an injury to the boy, or that the act of the defendant in locating the wire was not the proximate cause of the accident.

Testimony that the defendant's employes removed the wire from the structure a month after the accident, held competent to prove defendant's ownership of the wire, and admissible in corroboration of other proof of such ownership.

Appeal by defendant from judgment of Supreme Court, Kings County, upon a verdict for the plaintiff of \$8,000, and

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from an order denying defendant's motion for a new trial upon the minutes.

John Notman (Lewis H. Freedman with him on the brief),
for the appellant.

Foster L. Backus, for the respondent.

GOODRICH, P. J.: On July 8, 1898, Edward J. Wittleder, the plaintiff, a boy about ten years of age, was playing with a companion on a platform or landing of the stairway leading to the elevated railroad station on Fifth avenue, at the corner of St. Mark's place, Brooklyn. Upon the structure of the railroad company were strung electric light wires belonging to the defendant, which extended parallel to the said platform, on a cross-arm projecting at right angles thereto, and at a distance therefrom variously estimated at from ten to eighteen inches. On each side of the stairway was a balustrade, which, at the platform, extended about four feet above the floor, the space between its handrail and the platform being taken up by a sheet of iron along the floor and about a foot and a half in height, above which was a lattice work of iron. There was evidence tending to show that the plaintiff, with another boy, was playing on this platform; that while so doing, and standing with his back to the rail, he put one foot into the lattice work, the other being on the floor, and, leaning backward, casually extended one arm over the rail; that his hand came in contact with an electric light wire belonging to the defendant, thus forming a ground connection between his hand and the foot in the iron lattice work, so that a current of electricity passed from the wire through his body from hand to heel, and he received a severe shock and burn, necessitating the amputation of the thumb and two fingers of his right hand, and other injury. The jury found a verdict for \$8,000, and from the judgment entered thereon the defendant appeals.

As to the order denying the motion for a new trial on the ground that the verdict is against the weight of evidence, we have carefully examined the record, and while there is some ground for question whether the boy received his injuries exactly in the manner described by him; whether, with his face toward the wire, and reaching out over the rail, he took hold of the wire, or whether, with his back to the rail and wire, he threw out his arm and touched the wire accidentally, still these were questions of fact which the court was required to, and did, submit to the jury. With that verdict we see no reason to interfere.

The defendant contends that the complaint sets out an action based on its negligence and not on the ground that it maintained a nuisance. The contention is not sound. The complaint alleged that the defendant "negligently constructed and operated" the wire "within one foot of and unlawfully and dangerously near the platform," and that it "was not sufficiently nor properly nor carefully insulated nor covered nor protected." This alleges facts sufficient to justify the admission of evidence to establish the existence of a nuisance, inasmuch as the state of affairs complained of existed in a public street or highway. But it is also an allegation of negligence. There was no motion to put the plaintiff to his election, and he would have been entitled to recover on either theory if there was sufficient evidence in other respects for that purpose.

It is not necessary for us to pass upon the question on which theory the plaintiff's right of action depends, for the evidence would lead us to conclude that the jury might have found that the defendant was liable on either theory. A wire carrying along a public street, in a densely populated city, electricity with a voltage sufficient to inflict the injuries which the boy received, is a constant and imminent menace to the safety of those who approach it, and requires a degree of care in its erection and maintenance commensurate with its liability to do injury. There was conflicting evidence as to the unnecessary proximity of the wire to the rail of the balustrade, and as to the

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swaying of the wire nearer to the rail on account of the passing of trains, but we think these questions were fairly submitted to the jury.

The defendant's exceptions raise a question as to the contributory negligence of the boy, in that he was not lawfully on the platform, and, therefore, was a trespasser. We do not think this is a question which can be raised by the defendant, as not it, but the railroad company, was the owner of the stairway. It may be conceded that the boy was a trespasser as against the railroad company, and that within the doctrine of *Walsh v. Fitchburg R. R. Co.*, 145 N. Y. 301, there could have been no recovery against it for an accident occurring there. The defendant, so far as the record shows, seems to have no right to string its wires on the elevated railroad structure. It does not allege any such right in the answer, and there is not sufficient evidence to enable us to pass upon its right to erect or maintain the wire where it was. There were some suggestions looking to that end and to the regulations of the city as to the methods of stringing wires, but there was none as to any right or license from the railroad company to the defendant to use the railroad structure for such purpose. For all that appears, the defendant was just as much a trespasser on the railroad structure as, according to its claims, the boy was. At any rate the defendant is not in a position to defeat the action on the ground referred to.

The defendant also contends that it could not reasonably have anticipated an injury to the boy, and that the act of the defendant in locating the wire was not the proximate cause of the accident; but we cannot affirm this as matter of law. It was purely a question of fact on the evidence whether the wire was so dangerously near the rail that a person using the stairway might be injured by it. The court, in refusing to dismiss the complaint, stated that the only grounds upon which the case would be submitted to the jury were as to the contributory negligence of the boy, and whether "it could have been reasonably anticipated that this wire would become a source of danger to people who

were invited or permitted to use the stairway;" and such was the charge. It is hardly necessary to say that the verdict establishes this fact in the plaintiff's favor.

There was some evidence to show that the wire in question was not properly insulated and that there was a break in the insulation at the part touched by the boy. The evidence as to the degree of care exercised by the defendant in the inspection of the wire was rather unsatisfactory, but it is unnecessary to refer to this further than to say that the court did not submit this question to the jury because, as the learned justice stated, there was nothing to show how long the wire had been in that condition, whether it was in that condition at the time of the accident, or whether the insulating material was burned off by reason of the contact with the boy's hand.

The defendant excepted to the refusal of the court to charge "that one entering the premises of another, such as the stairs of the elevated railway on Fifth avenue, is a mere licensee, and is himself bound to exercise ordinary care and diligence, and also that these elevated stairs are for the purpose of ingress and egress to the elevated road, and that the defendant could not reasonably anticipate that boys and girls would be playing on such stairs in a manner to be injured by a wire outside of the railing." This request must be taken in its entirety, and, of course, if any part of it was exceptionable, the whole request was properly refused. It involves three propositions: First, that the plaintiff was a mere licensee while on the stairway for purposes of play; second, that the stairway is merely for the use of elevated railroad passengers; third, that the defendant could not reasonably have anticipated that children would be playing on such stairway in such a way as to be injured by a wire outside the railing. As to the first proposition, we have already declared that the defendant, not being the owner of the stairway, was in no position to raise the question of the plaintiff's right to be there. As to the third, it cannot be said, as matter of law, that the defendant could not reasonably have anticipated that children would be playing on the stairway, as the evidence shows

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that they often played there; and it is manifest that both they and the passengers might have their hands on or over the rail. The defendant's request covered cases of injury to a person from a wire placed anywhere outside the rail and at any distance. The request on this proposal might have been proper as to a wire three feet from the rail, but not where it included in its scope a wire just outside and in close proximity to the rail, and, possibly, a swinging wire. The request cannot be sustained in its entirety, and the refusal to charge it was proper.

The defendant's counsel excepted to the admission of evidence to prove that, about a month after the accident, the wire was moved farther from the platform by the defendant's servants. He admits, however, that this evidence was competent to prove defendant's ownership of the wire, but contends that its admission was error, inasmuch as Abel, one of the defendant's employes, who was called as a witness by the plaintiff, had testified that the wire which injured the plaintiff was owned by the defendant. A careful reading of the testimony of Abel does not conclusively show that he testified that the wire from which the plaintiff received his injury belonged to the defendant, and as this was still in doubt, the evidence was competent to establish the fact of ownership. Besides, the plaintiff had the right to introduce other evidence than Abel's testimony on this point, as the jury might not have believed the witness without corroboration.

I should be much better satisfied to reduce this judgment to \$5,000, but my associates think it should not be reduced, and I yield to their views.

The judgment should be affirmed.

HIRSCHBERG, J., taking no part.

Judgment and order unanimously affirmed, with costs.

NOTE.—Upon re-argument of this case (50 App. Div. 478), the court further held that even assuming that the defendant had the right to string its wires upon the structure of the electric railway, still it owed a duty of care to the plaintiff, who must be assumed to have been playing on

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the stairway either by express permission or implied license of the railway company; and negligence could be properly predicated of the placing of an electric light wire in such close proximity to the stairway; and laid down the proposition that the stringing of a live electric light wire, contact with which will kill or severely injure, so near a thoroughfare where many people pass that contact with it is possible, is an act not of passive but of active negligence. The creation of such a condition is the creation of a nuisance.

See Mr. Keasbey's notes, *ante*, pp. 556, 561; also note 2 at end of Part III.

EDWARD O'DONNELL'S ADMINISTRATOR v. LOUISVILLE
ELECTRIC LIGHT COMPANY.

Kentucky Court of Appeals, Feb. 19, 1900.

ELECTRIC LIGHT COMPANY—DEGREE OF CARE.

It is the duty of an electric light company to make perfect insulation of its wires at places where persons have the right to go for business or pleasure, and to use the utmost care to keep such insulation perfect.

Cases of this series cited in opinion: *McLaughlin v. Louisville Elec. Lt. Co.*, vol. 6, p. 255; *Overall v. Louisville Elec. Lt. Co.*, vol. 7, p. 521.

Appeal by plaintiff from judgment of Circuit Court, Jefferson County.

Matt O'Doherty, for appellant.

Humphrey & Davie and *John W. Barr, Jr.*, for appellee.

HOBSON, J.: This is an action to recover for the loss of the life of appellant's intestate by reason of the alleged negligence of appellee. The intestate was in appellee's service, and was ordered by it to climb one of its poles, and fasten to it a bracket to which two wires were to be attached. While twisting one of the wires around the bracket with his pliers, in some way his left arm came in contact with another wire, charged with 2,000

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volts of electricity, which thus passed through his body, causing instant death. Appellant contended that the wire he so touched with his left arm was an arc wire, which should have been dead, or without any current of electricity, and that by reason of the negligence of the defendant in not having this wire properly insulated the intestate lost his life. On the other hand, appellee contended that the intestate had himself stripped the insulation off both the wires he was to fasten to the bracket, and that his death was due to his touching with his left hand one of these stripped wires while working with his pliers on the other. The proof was conflicting, and it was a question for the jury, on all the evidence, whether the intestate's death was due to negligence on the part of appellee, or whether there was contributory negligence on his part, but for which he would not have lost his life. The case was tried before the decision of this court in *McLaughlin v. Louisville Elec. Light Co.*, 6 Am. Electl. Cas. 255, 100 Ky. 173, 37 S. W. 831. The instructions of the court to the jury were substantially the same as those condemned in that case and in the subsequent case of *Overall v. Louisville Elec. Light Co.* (Ky.), 7 Am. Electl. Cas. 521, 47 S. W. 442, 20 Ky. Law Rep. 759.

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 NOTE.—See Mr. Keasbey's notes, *ante*, pp. 556, 561. Also note 2 at end of Part III.

ISAAC THOMAS' ADMINISTRATOR AGAINST MAYSVILLE STREET
 RAILWAY COMPANY AND MAYSVILLE GAS COMPANY.

Kentucky Court of Appeals, March 29, 1900.

INJURY BY ELECTRIC SHOCK—DUTY OF INSULATION.

A company furnishing electricity for pay to another company is bound to see that the latter performs its duty of keeping the wires through

which the current passes properly insulated, irrespective of who owns or controls the wires. So *held*, in an action based on death from shock by contact with an uninsulated guy wire which had broken loose and hung down to the street.

Case of this series cited in opinion: *McLaughlin v. Louisville Electric Light Company*, vol. 6, p. 255.

Appeal from Circuit Court, Mason County.

A. E. Cole & Son and *Thos. R. Phister*, for appellant.

A. M. J. Cochran, for appellee.

PAYNTER, J.: This action was instituted by the appellant against the Maysville Street Railway Company and the appellee, the Maysville Gas Company. The street railway company operated an electric car line in the city of Maysville, and the appellee, the Maysville Gas Company, was engaged in the business which its name suggests; and, in addition thereto, it had in its possession and control a dynamo, and thus supplied the street railway company with electricity to operate its car line. The wires of the street railway company were constructed along the streets of the city, and a guy wire had been broken loose, and, not being properly insulated, it was charged with electricity; and as the plaintiff's intestate, a boy, was passing along, he came in contact with it, which resulted in producing his death. The trial resulted in a verdict against the street railway company, from which no appeal seems to have been prosecuted. At the conclusion of the testimony for the plaintiff, the court instructed the jury to find for the appellee, the Maysville Gas Company, and it is to review the action of the court in that regard that this appeal is prosecuted. So the important question in this case is as to whether it is responsible for the death of the boy, if it was the result of negligence in failing to keep the wires charged by it with electricity properly insulated.

There are some minor questions raised, but it is sufficient to say that we agree with the court below in regard thereto. However, at this point we will add that the court properly compelled

the appellant to elect which cause of action he would prosecute; his right to recover being restricted either to the common-law cause, for mental and physical suffering, or the statutory cause, for the death of his intestate. *Railway Co. v. Barclay's Adm'r* (Ky.), 43 S. W. 177. It is not necessary to consider the question as to whether the motion was made in time, as the case is reversed, and on the next trial the motion can be heard at the proper time.

The street railway company owned and had charge of the wire, and the gas company generated and sent into the wire the electricity. The gas company received so much per month for supplying the wires of the street railway company with electricity to operate its line of street cars, and it had no interest in the car line, except that its income might enable it to pay the bill for the electricity. That there was a duty imposed by law upon the street railway company to keep its wires properly insulated, so that those whose business or pleasure brought them in dangerous proximity to them might be protected from the deadly current which they conducted, cannot be questioned. Without the electric current which the gas company sent through them, contact with them was harmless. When so charged, they became instruments of death, threatening the lives of those who perchance came in contact with them. Did the fact that the gas company supplied the harmless wires with the force which converted them into a death-dealing agency make it responsible for the injury which resulted in the death of the intestate? The exact question submitted has not, so far as we are aware, been answered by any court of last resort. Some cases are cited by counsel, but the facts of those cases are not similar to the facts of this case. Therefore we must find some signboard along the new road, and, if we cannot so find the way to a proper conclusion, we will be forced to swing a sickle into the field of reason, and there harvest a principle which can be crystallized into a just rule to apply to cases like this one. By the machinery in use by the gas company, it produced and controlled the elec-

tricity. It is presumed to, and did, know the dangerous force it was putting in motion, and that it constantly imperiled the lives of those who passed along the streets where the wires were in use, unless they were properly swung and insulated. Knowing the dangerous character of the force it supplied, it was bound to use the care commensurate with the danger of its employment, so as to protect those who passed along the streets or places where the wires were placed. The electric current went in a continuous stream from the power house through the wires. Its flow could only be stopped by the agency at its source. That agency controlled the electric current at the furthest point from the power house as it did at the point where the wires of the street railway company connected with the generator. From the instant the force was generated, it remained under the control of the appellee. As it were, the hand that controlled the generator applied the deadly force to the body of the intestate. Considering the dangerous character of the force produced by the gas company, there was a duty imposed on each to see that the wires into which it was sent were properly insulated. The danger was exactly the same whether the wires were owned by one or both of the companies. When one through the instrumentality of machinery can accumulate or produce such a deadly force as electricity, he should be compelled to know that the means of its distribution are in such condition that those whose business or pleasure may bring them in contact with it may do so with safety.

It is urged on behalf of the gas company that a manufacturer of electricity, who delivers it to another, and thus parts company with it—its dangerous character not being concealed, and such other person being competent to look after and control it—does not owe any duty to any one. It is assumed, if this be not true, that every person who delivers a dangerous substance into possession of another, under a contract of sale or hiring by which it parts with the control, would be liable for the negligent acts of the person to whom it is delivered, after the delivery. In the

first place, electricity is unlike any other dangerous matter or force known to science. In the second place, it was not delivered to the street railway company, and placed in its possession and control. The control of it, from the very nature of it, remained with the gas company. As an evidence of it, when the boy was held by the wire he could not be rescued until the gas company stopped the electric current. An example of the delivery of electricity is furnished when an electric company charges a battery, and delivers it to the owner of an automobile or an electric launch, in which event no duty would rest upon the company as to the manner of its use. There can be no actual delivery of powder, dynamite, or nitro-glycerin, and a complete control transferred to another. Therefore it does not follow that, because it has been sold and delivered to another, there is a responsibility upon the seller to see that it is properly used. If A. should accumulate a great body of water above a city, and agree with B. to supply him with whatever quantity he desired, provided he would furnish a pipe to convey it to the place where he desired to use it, and thereupon B. connected with the body of water a pipe which was not properly constructed so as to convey the water safely, and in consequence thereof the water should escape from the pipe and destroy the property or lives of others, could A. escape liability by saying that he sold the water to B. for so much per gallon, and delivered it to him at the point of connection, and he no longer had any control over it, and consequently no liability? We think not. The case we have under consideration is even stronger than the illustration given. One must use his own property so as not to do injury to another. The use of the wires would have been harmless, except for the current of electricity; and that current was sent into the wires by the appellee, producing the death of plaintiff's intestate. Then it was the use of the force (its property) it generated which produced the injury. If the wires were not properly insulated, and the death resulted therefrom, then both companies are liable, as it was the duty of the

street railway company to have its wires properly insulated, and there was a duty resting on the gas company to see that it was done, before charging them with electricity. Whart. Neg. sec. 851 announces the law to be as follows: "Wherever material, dangerous unless particularly guarded, is left unguarded, the party so leaving it is responsible for damages to another thereby produced. At common law a person using dangerous instruments or mechanisms does so at his peril, and is responsible for any damages not caused by extraordinary natural occurrences, or by the interposition of strangers." This court, in the case of *McLaughlin v. Louisville Electric Light Co.*, 6 Am. Electl. Cas. 255, 100 Ky. 173, 37 S. W. 851, 34 L. R. A. 812, had under consideration a case where the wires of an electric company produced the injury, and the court said: "But by far the most important question involved is the law applicable to the case. Electricity is a powerful and subtle force, and its nature and manner of use not well understood by the public; nor is its presence easily determined or ascertained. Its use for private gain is very extensive, and becoming more and more so. The daily avocation of many thousands of necessity bring them near to this subtle force, and it seems clear that the electric companies should be held to the use of the utmost care to avoid injuring those whose business or pleasure requires them to come near such a death-dealing force." From this it will be seen that the court is of the opinion that electric companies should use the utmost care to avoid injuring persons who may be brought in contact with wires charged with electricity. The judgment is reversed for proceedings consistent with this opinion.

Du RELLE and BURNAM, JJ., dissenting.

NOTE.—See note 2 at end of Part III.

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CHATTANOOGA ELECTRIC RAILWAY COMPANY V. ROBERT A. MINGLE.*Tennessee Supreme Court, March 30, 1900.*

(103 Tenn. 667.)

INJURY BY SHOCK FROM FALLEN LIVE WIRE—RES IPSA LOQUITUR.

The falling into the street of a wire so heavily charged with electricity as to be a source of danger to persons lawfully in the street, is of itself proof of negligence of the company maintaining such wire, which, unless rebutted, will entitle a person injured thereby to recover damages.

Cases of this series cited in opinion: *Denver Consol. Elec. Co. v. Simpson*, vol. 5, p. 278; *Giraudi v. Electric Imp. Co.*, vol. 5, p. 318; *Ugla v. West End St. Ry. Co.*, vol. 4, p. 389; *Snyder v. Wheeling Elec. Co.*, vol. 7, p. 473.

Appeal by defendant from judgment of Circuit Court, Hamilton County.

Brown & Spurlock, for plaintiff in error.

S. B. Smith, for defendant in error.

BEARD, J.: The plaintiff in error operates a line or lines of electric railway in the city of Chattanooga, with overhead trolley wires. The defendant in error, while riding a bicycle with due care along one of the most-used public streets of that city, suddenly found that he was about to run over a fallen guy wire of the electric company, and, in endeavoring to avoid it, received a serious injury, to recover damages for which this suit was brought. The case discloses that an approaching car in some unexplained way slipped its trolley, which, as it rose, struck this guy wire and broke it. On breaking, it fell to the ground immediately in front of the defendant in error. At the time of the accident the wire was carrying at least 500 volts of elec-

tricity—an amount perilous to the life or limb of one who came in collision with it. This being the entire case, upon submitting it in charge to the jury the trial judge said that the rule of *res ipsa loquitur* applied, and, if they were satisfied the injury to the plaintiff was the proximate result of the fallen wire, then there arose a presumption of negligence on the part of the defendant company, which, unless rebutted, would entitle plaintiff to recover. The trial having resulted in a verdict against the electric company, and its motion for a new trial being overruled, the case is presented to this court on an assignment of error in the foregoing instruction.

We agree with the counsel of plaintiff in error that the rule is “that those who go on a highway may well be held to do so subject to their taking upon themselves the risk of injury from inevitable danger, where carelessness cannot be charged upon any one.” But was the fall of a dangerously charged guy wire an inevitable danger? That it was unexpected is, no doubt, true; but many accidents occur from defective mechanical contrivances, which, though not anticipated, are by no means inevitable, because they might have been avoided by the exercise of care corresponding with the danger attendant upon the contrivance. In the case at bar the guy wire, charged as it was with a heavy electric current, was suspended over a street crowded with persons, passing at all times of the day, and was intrinsically dangerous yet the risk of accident therefrom was not inevitable. If the wire was made of good material, and was properly attached above and below, and then carefully supervised, there was no inevitable danger incident to its suspension above the street. If, however, the wire was imperfectly constructed or attached, or if, properly attached in the beginning, it was neglected for a period of time sufficiently long for expansion or strain upon it to weaken the attachments, then it did become a menace to the public; and the company, being guilty of the negligence which contributed to this condition, was responsible for the damage proximately resulting therefrom. Such

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a wire is used as a brace to strengthen and hold in place the main wire or wires, and is put up, not to fall, but to retain its safe level above the street. To accomplish the purpose of its erection, it was required to be heavy and strong enough to stand the force of the strain, as well as that of an ordinary blow. It is common experience that in propelling a car the trolley will sometimes slip from the wire along which it is passing, and if, in so doing, it comes in contact with a guy wire, it is apparent that the latter should be of sufficient strength and fixity to withstand the violence of the stroke; and, if it fails to do so, it is not an unreasonable inference that there has been negligence in its selection, construction, or supervision. In view of the extreme peril consequent on the displacement and fall of the wires in an electric railway system, it is essential that a high degree of care be exercised, not only in their construction, but in their continued maintenance in a good and safe condition. *Denver Consol. Electric Co. v. Simpson*, 5 Am. Electl. Cas. 278, 21 Colo. 371; *Giraudi v. Electric Imp. Co.*, 5 Am. Electl. Cas. 318, 107 Cal. 120. If this be not done, then, with the growing network of wires suspended over the streets of our towns and cities, those who use these streets in the exercise of a common right will do so in constant peril. Under these circumstances, we think no hardship is imposed upon the defendant, who is using this dangerous agency of electricity along overhead wires, when an accident occurs from a wire which has fallen to the street or dangerously near it, in requiring him to repel a presumption of negligence. Unless the rule of *res ipsa loquitur* is applied, it is evident that in a large number of cases liability for the resulting injury will be escaped. It is within the power of the defendant at all times to show whether he has exercised due care in the selection of material and in their erection and subsequent supervision, while to prove an actionable lack in these things would be, in most cases, practically beyond the reach of the party injured.

The rule laid down by the trial judge in this case has been

applied frequently. *Kearney v. London, &c. R. R. Co.*, L. R. 5 Q. B. 411, was an action to recover for an injury to one who, passing over a brick bridge, was struck by a brick falling from one of its piers. The bridge was three years old, and just before the injury in question a train had crossed it. In answer to the insistence that, before he could recover, the plaintiff must show acts of negligence, and that the dislodgment might have resulted from a change of temperature, against which no foresight could have guarded, COCKBURN, C. J., said: "It is true that it is possible that, from changes in the temperature, a brick might get into the condition in which this brickwork appears to have been, from causes operating so speedily as to prevent the possibility of any diligence and care, applied to such a purpose, intervening in due time so as to prevent any accident. But inasmuch as our own experience of these things is that bricks do not fall out when brickwork is kept in a proper state of repair, I think, where an accident of this sort happens, the presumption is that it is not the frost of a single night or of many nights that would cause such a change in the state of the brickwork, as that a brick would fall out in this way, and it must be presumed that there was not that inspection and that due care on the part of the defendants which it was their duty to apply." It seems eminently proper that it should prevail, in view of what has been said, in a case like the present. In 2 Jaggard on Torts, sec. 864, the author says that proof of contact with a live wire, and of damages resulting therefrom, makes a complete case of *prima facie* negligence against the defendant; and in Croswell on Electricity, sec. 249, it is said that the mere fact that an electric wire sags or falls affords sufficient evidence of negligence. And such was the holding in *Ugla v. W. E. St. Ry. Co.*, 4 Am. Electl. Cas. 389, 160 Mass. 354, and *Snyder v. Wheeling Electric Co.*, 7 Am. Electl. Cas. 473, 39 L. R. A. 502 (W. Va. Rep. 1897). We find no error in the record, and the judgment of the lower court is affirmed.

NOTE.—See Mr. Keasbey's note, *ante*, p. 446; also note 2 at end of Part III.

**BRUSH ELECTRIC LIGHT AND POWER COMPANY V. E. LEFEVRE
AND WIFE.***Texas Supreme Court, June 11, 1900.*

(93 Tex. 604.)

**SHOCK FROM ELECTRIC WIRES—DUTY AS TO UNFREQUENTED PLACE—PLEAD-
ING ORDINANCE.**

An electric light company cannot be held liable for death caused by shock from its uninsulated wires, in a place where persons could not reasonably be expected to go. The top of an unrailed wooden awning attached to a house, about sixteen feet above the street, *held* to be such a place.

An ordinance requiring electric wires to be maintained at a certain height, *held* insufficiently pleaded.

Appeal by defendant below from judgment of Court of Civil Appeals of First Supreme Judicial District, affirming a judgment in favor of plaintiffs.

Terry, Ballinger, Smith & Lee, for plaintiff in error.

Jas B. & Chas. J. Stubbs and *Edwin S. Easley*, for defendants in error.

BROWN, J.: E. and Clara Lefevre, being husband and wife, sued the plaintiff in error in the District Court of Galveston County for damages on account of the death of Paul, charged to have been occasioned by the negligence of the electric light company. The case was tried before a jury, and resulted in a verdict and judgment for \$1,000 for E. Lefevre, and \$3,000 for Clara Lefevre, which judgment was affirmed by the Court of Civil Appeals. It will not be necessary to give a full statement of the facts in this case. The facts necessary to an understanding of the questions decided by us are as follows: Paul Lefevre was killed by coming in contact with the defendant's wires, maintained and operated by it in the city of Galveston, which wires were suspended diagonally across the intersection

of Strand and Twenty-first streets, in that city. The wires were fastened upon awnings at the northeast and at the southwest corners of the intersection of said streets. Between these points two wires extended at the height of about 16 feet from the street; and at the northeast corner they were fastened upon a trestle about $2\frac{1}{2}$ feet above the top of the awning in front of the house situated on that corner, and from the top of the trestle they extended down to the awning, and thence into the building, for lighting purposes. The top of the trestle on the awning was about 19 feet, and the top of the awning was about 16 feet, from the level of the street. The wires between the top of the trestle and the awning had been spliced, and were entirely bare; having no insulation upon them. E. Lefevre, assisted by his son and others, was engaged in moving a house along Strand towards the east, and, arriving at the intersection of Strand and Twenty-first street, they found that the wires were hanging too low for the house to pass under them; the top of the house being about 24 feet above the level of the street. E. Lefevre went upon the awning in question, and, having fastened a rope to the wires to lift them above the house, threw it to his son, who was upon the top of the house that was being moved; and E. Lefevre, in order to assist his son, caught hold of the wires, receiving a shock that produced unconsciousness. Paul, seeing the condition of his father, jumped from the top of the house onto the awning, and, with the help of another, released the father from the wires; and, he being restored to consciousness, Paul fell from some cause, and his father fell likewise upon him, on the top of the awning. Paul caught with both of his hands the two wires extending from the trestle to the awning, and received a shock that produced his death. There is no evidence that this awning was ever used as a place of resort or for any purpose whatever, by persons going upon the top of it; and the photographic views of it, which were in evidence, and are in the statement of facts, indicate that it was simply an awning built for shade and protection to the sidewalk and the front of the house to which it was attached.

We shall discuss but two questions presented by the application: First. Were the allegations of the petition, setting up the ordinance which required the wires to be raised 25 feet above the street, sufficiently definite? Second. Was there any evidence of negligence on the part of the plaintiff in error which proximately caused the death of Paul Lefevre?

The plaintiffs' petition contains these allegations: "That, in obedience to the ordinances of the said city of Galveston, it is, and was on the day and date above named, the duty of the defendant company to cause all of its electric wires to be suspended, and keep them suspended, at least twenty-five feet above the grade of the streets, and to cause same to be properly and completely insulated from surface contact; . . . that said wires were not suspended twenty-five feet above the grade of the streets at said point, but were suspended only about fifteen feet, and by reason of this fact it became necessary to lift said wires higher, in order that the house might pass thereunder." The allegations of the petition, as set out, are the conclusions of the pleader upon the legal effect of the ordinance; but the provisions of that ordinance are not alleged, either in terms or in substance, so that the court could, from the plea, determine what was required by it of the electric light company. The special exception interposed by the defendant below to the foregoing allegations of the petition should have been sustained. *City of Austin v. Walton*, 68 Tex. 507.

There can be no liability for the injury in this case unless, from all the circumstances, the electric light company could reasonably expect that some person might be injured by its failure to cover the wires placed by it upon the awning where the deceased received his injury. *Tex. & Pac. Railway Co. v. Bigham*, 90 Tex. 225. In the case cited, Chief Justice GAINES, on behalf of the court, expressed the rule in the following language, quoting from the Supreme Court of the United States in the case of *Milwaukee Railroad Co. v. Kellogg*, 94 U. S. 469: "But it is generally held that in order to warrant a finding that negli-

gence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.' This is probably as accurate a statement of the doctrine as can be given, and is substantially that generally laid down by the authorities." Applying this rule to the facts of this case, the inquiry arises: Would an ordinarily prudent man, looking at the surroundings as they then appeared, have reasonably expected that any person would be upon the awning, and might be injured by coming in contact with the exposed wires? If such a consequence might have been reasonably foreseen, then the plaintiff in error would be liable for the injury, under the facts of this case, unless there be some other defense. If not, then it cannot be held liable for the death of Paul Lefevre. If the testimony is such that a jury might have found that the electric light company ought to have anticipated the injury, then the court cannot inquire into the correctness of such a conclusion, although it might differ with the jury as to the correctness of the verdict. In the facts of this case there is not a scintilla of proof that the awning had been used by any person as a place of resort, either for pleasure or for business. Looking at the photographic views of the situation, the awning appears to be such as is common in the towns and cities as a protection to the front of the building, with no railing or other protection upon the top or roof showing the intention for persons to resort there for any purpose whatever. If a man of ordinary prudence had been placing the wires at the same points, the facts would not have notified him that probably some one would be injured by them. From the street and the sidewalk to the place where the exposed wires were located is a distance of about 16 feet, which must have been at least 10 feet above the heads of men of ordinary height passing along the street, and there were no means by which passers upon the street or sidewalk could come in contact with the wire. It was, therefore, not negli-

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gence, with regard to persons traveling along the street or sidewalk, to leave the wire exposed, because there was no reasonable, and scarcely a possible, chance for such persons to be injured thereby. We are of opinion that there is no evidence upon which a jury could base a verdict in favor of the defendants in error, and the trial court erred in refusing to give the requested instruction to find for defendant. For the error of not sustaining the exception to the plaintiffs' petition, and because there is no evidence of negligence on the part of the electric light company, the judgments of the District Court and Court of Civil Appeals are reversed, and this cause is remanded.

NOTE.—See note 2 at end of Part III.

WESTERN UNION TELEGRAPH COMPANY AND OTHERS V. GRIFFITH.

Georgia Supreme Court, August 7, 1900.

(111 Ga. 551.)

INJURY BY ELECTRIC SHOCK—JOINDER OF PARTIES.

In an action brought for the recovery of damages for injuries alleged to be due to the circumstances that telegraph wires were so maintained relatively to electric light and electric street railway wires that heavy currents of electricity were liable to be conveyed to the telegraph wires and thence to the ground, *held*, that all the companies maintaining the wires were properly joined as defendants.

Appeal from order of City Court of Richmond, overruling demurrer to complaint.

J. S. & W. T. Davidson and F. G. Du Biquon, for plaintiffs in error.

C. H. Cohen, J. B. Lamar, and Boykin Wright, for defendant in error.

FISH, J.

2. The case made by the petition filed by Mrs. Griffith was, in brief, as follows: The telegraph company maintains in the city of Augusta and the village of Summerville a system of poles and wires extending through various streets upon which the railway and electric company has likewise erected a similar system of poles and wires used in connection with its business. At some places the wires of the telegraph company, which are strung on poles which are higher than those used by the other company, cross the wires of that company, while at other points the wires connected with the two systems run parallel with each other on the same streets. The wires of the railway and electric company are heavily charged with currents of electricity "sufficiently powerful to do great bodily harm." On or about the 2d day of December, 1896, there was a fall of sleet and snow, and "the wires belonging to and controlled by the said defendants were each and all heavily weighted by said snow and sleet." As a result "thereof, the wires of the said defendants came in contact with each other at sundry points and places in the city of Augusta and in the village of Summerville," and "by reason of such contact the powerful currents in the wires of the Augusta Railway & Electric Company were conducted to and into the wires belonging to and controlled by the Western Union Telegraph Company," of which fact "both of the defendants had knowledge." Because of "said contact, the wires of the Western Union Telegraph Company became dangerous to persons and property touching or being touched by the same, (and) both of said defendants had knowledge of said danger." The wires of the two companies were thus in contact "at and near the intersection of Walton Way and Telfair street in the village of Summerville, and at divers other places in said village and city,"

and this was known by both companies. On the date above mentioned a rotten and unsound pole belonging to the telegraph company, situated "in the yard of the Bonair Hotel," broke, and fell across a roadway leading to that hotel, carrying with it the wires which had been strung upon it. "Said pole was negligently allowed to remain upon the ground with the wires upon and across said roadway for a long space of time, to wit, 18 days," notwithstanding "the said defendants, and each of them, had notice of the fact that said pole had fallen, and that said wires were across said roadway," and although both "knew that the said wires so as aforesaid upon the ground were dangerous, and likely to produce injury to any person or thing passing along said roadway." On the 15th day of December "petitioner had occasion to visit the Bonhair Hotel on business," and was driven thither in a vehicle through the Walton Way entrance to that hotel. Neither she nor the driver knew of the dangerous conditions of the wires across the roadway leading to the Telfair street entrance, and in attempting to return by that route one of the horses drawing the vehicle in which she was riding stepped upon one of the wires, and received a violent shock, which threw it to the ground. In falling, the horse turned or tilted the vehicle to such an extent that petitioner, who was greatly alarmed, and was trying to alight, either fell or was thrown to the ground. She not only sustained serious injuries by reason of this fall, but also "received a violent burn from the electric current" with which the wires upon the ground were charged. In addition to other items of damage specifically alleged, she was "forced to incur an expense of \$—— for medical attention and nursing." One of the defendants in the court below, the telegraph company, met the plaintiff's petition with a general demurrer, and also demurred specially thereto on the ground that there was a misjoinder of parties defendant therein. We now rule specifically, as was practically decided when the case was here at the March Term, 1898 (104 Ga. 62, 30 S. E. 420), that the plaintiff set forth in her petition a cause of action, and

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properly joined therein as joint tort feasons the two corporations through whose negligence she was injured.

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NOTE.—See Mr. Keasbey's note, *ante*, p. 547; also note 2 at end of Part III.

BOYD V. PORTLAND ELECTRIC COMPANY.

Oregon Supreme Court, October 15, 1900.

(37 Or. 567.)

INJURY BY ELECTRIC SHOCK—NEGLIGENCE.

Where the wires of an electric light company supplying a large city have been prostrated in numerous places at the same time by reason of an unusual and unexpected storm, it is not, as a matter of law, negligent for the company to leave one of the wires for several hours so hanging as to inflict injury upon a passer-by; but such question of negligence is for the jury.

Case of this series cited in opinion: *Denver Consol. Elec. Co. v. Simpson*, vol. 5, p. 278.

Appeal by defendant from a judgment of the Circuit Court of Multnomah County, in favor of the plaintiff entered upon the verdict of a jury.

This is an action by William Everett Boyd, by R. B. Boyd, his guardian *ad litem*, against the Portland General Electric Company, to recover damages for an injury to plaintiff from an electric light wire. The defendant is a corporation, engaged in supplying the city of Portland and its inhabitants with electric light, for which purpose it has erected poles in the streets, with arms near the top bearing the wires which transmit the electricity. During the afternoon and night of December 6, 1897, a violent wind and rain storm, prevailing in Portland and vicinity, prostrated defendant's lines in many places. In Woodlawn,

a suburb of the city, about 6 or 7 o'clock in the evening, one of the wires stretched over Magnolia street parted at a point about one hundred and twenty feet west of Dakota street, and, crossing over the other wires, hung down in two loops, one of which swung near the ground, about two or three feet west of the pole at the intersection of the streets. About 8 o'clock on the morning of the 7th, plaintiff, who was 11 years of age, and resided with his father on Dakota street, about two hundred feet south of its junction with Magnolia, was sent on an errand requiring him to pass near the light pole at the corner. A few minutes later he was discovered lying on the ground immediately under the broken wire, in an insensible condition, his right hand badly burned, and the back of his head so burned that the flesh thereafter sloughed off, leaving a circular space, about three inches in diameter, bare to the skull. No one witnessed the accident, and the plaintiff was unable to give any account of how it occurred, but it is agreed that it was caused by contact with the broken wire. It is alleged in the complaint, among other things, that defendant did not exercise due care and diligence in replacing and taking care of the wire after it had parted on the evening of the 6th, and is therefore liable for the injury suffered by the plaintiff. The answer denies the negligence charged, and for an affirmative defense alleges contributory negligence. The trial resulted in a verdict in favor of the plaintiff for \$5,000, which was reduced by the trial court to \$2,500, and a judgment entered accordingly. The defendant appeals, assigning as error the misconduct of plaintiff's counsel, and the giving and refusal of certain instructions by the trial court.

Dolph, Mallory & Simon, for appellant.

Dufen & Menafee, for respondent.

BEAN, C. J. (after stating the facts):

2. The principal question on the trial was whether the defendant was negligent in not removing the broken wire. Plain-

tiff insisted that it was negligence to allow the wire to remain thirteen hours after it fell before taking care of it, while defendant contended that it exercised the utmost diligence in repairing the damages to its system caused by the storm, but was unable to reach the wire in question prior to the accident. The court, after stating to the jury the respective positions of the parties, and that whether the defendant had exercised reasonable care and diligence in the matter was a question of fact for their determination, further instructed them as follows: "The suggestion is made that they (defendant company) had not sufficient force to carry on this work, to raise all these fallen wires, as early, perhaps, as they ought to have done; but companies of this sort, dealing with one of the most subtle and powerful agencies known to man, cannot plead want of assistance and amount of expense as an excuse for any dilatoriness whatever. The law requires reasonable care, and reasonable care must be determined by all the circumstances attending the transaction,—what took place at the time, what took place before." And, again: "Reasonable care in such matters means the utmost care and skill which a man is capable of exercising, considering the immediate circumstance in hand. So it must be, then, that if there was not sufficient force in order to prevent dangers that might arise from fallen wires, if you find from the testimony in the case that the defendant was negligent or dilatory in raising the wires that had fallen, that considerable time elapsed after it was broad daylight the next morning before the agents, servants, of the company made their appearance to repair the wires, you will consider that question in connection with the question of damages and upon the issue of negligence." It is insisted, and we think properly, that this instruction imposed a higher degree of duty, as a matter of law, upon the defendant company than is exacted of it. An electric light company that has erected its poles and wires in the streets of a municipality, with the consent of the proper authorities, is not an absolute insurer against accident therefrom. It is only bound to exercise care and dili-

gence in the erection and maintenance of its system proportionate to the danger,—*Croswell, Electricity*, sec. 236; *Keasbey, Electric Wires*, (2d Ed.), sec. 236 *et seq.*; *Denver Consol. Elec. Co. v. Simpson*, 21 Colo. 371, 31 L. R. A. 566, note (41 Pac. 499),—and when it has fulfilled this duty it has discharged its entire obligation, and its liability ceases. The question of whether or not it has exercised reasonable care is for the jury to decide upon the facts of each particular case, except when reasonable minds could not possibly differ in their conclusions upon the facts. The amount of care necessary, of course, varies with the danger which is incurred by negligence; and, in determining the question, it is proper for the jury to take into consideration the location of the lines, whether in a thickly or sparsely settled portion of the municipality, the use to which they are to be put, the harmless or dangerous nature of the current to be transmitted over them, their remoteness or proximity to travelers on the highway, and any other circumstances affecting the case.

But where, as the evidence here tends to show, the wires of a company supplying a city of the size and area of Portland have been prostrated in numerous places at the same time by reason of an unusual and unexpected storm, it is imposing upon the company a duty not required by any of the decisions to say that it cannot show, as an excuse for a delay in taking care of a particular wire in a suburban part of the city, the want of assistance sufficient to immediately repair all the damages caused by the storm. Whether the defendant company had in its employ a large enough force of men to meet the emergency, and whether its want of assistance was an adequate excuse for its delay in not sooner taking care of the wire which caused plaintiff's injury, were proper matters for the consideration of the jury in determining the question whether it had exercised reasonable care and diligence; but it was not the province of the court to say, as a matter of law, that want of assistance was no excuse for the delay. That question belonged to the jury, not to the court. It

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follows that the judgment must be reversed, and a new trial ordered.

NOTE.—An excellent note by Robert G. Morrow, Esq., State Reporter, is appended to the official report of this case. See note 2 at end of Part III.

MARY WALES V. PACIFIC ELECTRIC MOTOR COMPANY.

California Supreme Court, Nov. 23, 1900.

(130 Cal. 521.)

DEATH BY ELECTRIC SHOCK.

Plaintiff's intestate having been killed by shock from a wire improperly insulated and maintained contrary to municipal ordinance, *held*, that the mere fact that the location of the wire had been changed by some extraneous cause, after it had been originally and unlawfully put in position, did not defeat the right of recovery, and that a charge to the contrary was error calling for reversal.

Appeal by defendant from judgment of Superior Court, San Francisco County.

John Flourney, for appellant.

Sullivan & Sullivan and *T. J. Roach*, for respondent.

GAROUTTE, J.: This is an appeal from a judgment in favor of Mary Wales, based upon the death of her son, alleged to have been killed by coming in contact with a live electric wire, which was improperly insulated and maintained by defendant in violation of an ordinance of the city of San Francisco. Deceased was engaged in painting a building at the time, and while changing the position of the wire by taking hold of it he received a shock which precipitated him to the street below and caused his death. The facts are ample to support the verdict, and it is unfortunate

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that the giving of certain instructions to the jury constitutes error which demands a retrial of the case.

The electric wires were situated upon the cornice of the building, and fastened thereon by wooden brackets. It is in evidence that one of these brackets had been broken off from its position by the foreman of the painters a short time prior to the accident, which act probably changed, to a very limited extent, the location of the wire which subsequently caused the death of the deceased. In view of the evidence upon this point the defendant requested, and the court gave, the following instruction to the jury: "That before plaintiff can recover in this action you must be satisfied that her decedent, without contributory negligence on his part, received his injuries by coming in contact with a wire in the position in which it was maintained by the defendant; and if you find that he received his injuries by coming in contact with a wire which had been broken from the insulator, and not in the position in which it was maintained by the defendant, then your verdict should be for defendant." By reason of our conclusion as to the unsoundness of another instruction, we will not analyze the foregoing proposition of law in detail. If it be intended by the language used to declare that a mere change in the position of the wire by some extraneous element, after it was originally placed upon the building by defendant, in violation of a city ordinance, acquitted it of negligence in this case, then the instruction is radically wrong. Defendant placed the wire upon the building and used it there, and the mere fact that the location of the wire may have been subsequently changed by some extrinsic cause of itself in no way defeats plaintiff's right of recovery. Defendant maintained the wires upon the building in violation of the ordinance, and would be equally guilty regardless of any change in their position. As already suggested, it becomes unnecessary to decide whether or not the jury disobeyed this instruction in finding a verdict for the plaintiff.

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Judgment reversed.

NOTE.—See note 2 at end of Part III.

JAMES FREEMAN, an Infant, by **JOHN FREEMAN**, his Guardian *ad litem*, Respondent, v. **THE BROOKLYN HEIGHTS RAILROAD COMPANY**, Appellant.

New York Supreme Court, Appellate Division, Second Department, November, 1900.

(54 App. Div. 596.)

INJURY BY ELECTRIC SHOCK TO BOY WALKING UPON GIRDER OF BRIDGE.

A bridge, being part of a public highway and maintained by the public authorities, was supported by two curved girders, 115 feet long, 13 feet high at the center, and having a flat upper surface. A trolley wire and a guard wire passed near an iron lamp-post erected on the apex of the arch of one of the girders. The guard wire carried no current. It was about three feet above the girder at the apex of the arch. A boy, *sui juris*, walking over the girder and trying to crawl between the guard wire and the lamp-post, was burned and shocked by the guard wire, which had become charged in some unexplained way, and fell to the floor of the bridge, sustaining injuries. The only fault ascribed to the defendant was that it permitted the guard wire to become charged with electricity. There was evidence that other boys had passed over the girder before, and that some had been burned.

Held, that the railway company was not bound to anticipate the occurrence of the accident, and owed the plaintiff no duty to keep the girder safe for travel thereon.

Case of this series cited in opinion: *Wittleder v. Citizens' Elec. Illum. Co.*, vol. 7, p. 581.

Appeal by defendant from order of Supreme Court, Kings County, vacating and setting aside order dismissing complaint.

John L. Wells, for the appellant.

Thomas F. Magner, for the respondent.

WOODWARD, J.: This action is brought to recover damages for injuries sustained by the plaintiff through the alleged negligence

of the defendant. At the close of plaintiff's case, and again at the close of the testimony, defendant moved to dismiss the complaint on the ground that the plaintiff had failed to show the defendant was negligent; that he had failed to show that he was free from contributory negligence, and that he had failed to make a cause of action against the defendant. This motion was denied, and was followed by a discussion between the court and counsel for the respective parties, resulting in the submission of the case to the jury. The jury disagreed, but before they were discharged the court granted a motion to dismiss the complaint, and the following day, on its own motion, the order was set aside, and this appeal is from the order setting aside the order dismissing the complaint. No objection is raised to the method of procedure, and we are asked to determine the case upon its merits.

The plaintiff is a boy ten years of age, who is conceded to be *sui juris*. On the 28th day of August, 1899, in company with another boy of about the same age, the plaintiff went to the bridge which crosses Bushwick creek, between Williamsburg and Greenpoint, at Kent avenue. This bridge was the scene of the accident complained of. It was constructed as a drawbridge and is built upon a turntable. The bridge is about one hundred and fifteen feet long, and there are two curved girders sustaining the bridge which come to the ground at either end, and in the center have a rise of about thirteen feet, at which point there is a lamp post. The bridge is a portion of the highway connecting Franklin street, Greenpoint, with Kent avenue in Williamsburg, and was, so far as we know, constructed and maintained by the public authorities. The two girders of this bridge presented a flat surface of about eighteen inches in width, broken by the projection at intervals of the bolt heads by which the lower portions of the bridge were fastened to the girders, while at the apex of the arch, lamp posts, occupying a considerable portion of the space, were erected. The defendant occupied a portion of the driveway across this bridge with its double-track

street surface railroad, operated by electricity. The bridge extends Franklin street in a straight line, but connects with Kent avenue in Williamsburg at an angle of about forty-five degrees, so that it was necessary in placing the trolley equipment to have certain spreaders or guy wires to hold the trolley wires over the center of the tracks in making the turn. From one of these spreaders, running across the bridge to the other, was another wire referred to in the evidence as a guard wire, designed to protect the trolley wire, carrying the current, from contact with other wires. Because of the curve the westerly trolley wire and the westerly guard wire, the latter being about three feet higher than the bridge arch when drawn tight, passed in close proximity to the lamp post of the steel girder. On the day of the accident the plaintiff, instead of keeping upon the footbridge, walked up one of these iron girders to the lamp post, and while in the act of crawling between the post and the guard wire he was struck upon the buttocks by the wire and burned. He grabbed for the wire with his right hand, accepting the plaintiff's version, receiving a severe shock which caused him to fall to the bridge below, fracturing his skull. The alleged negligence of the defendant is predicated upon the fact inferable from plaintiff's evidence that the guard wire was charged with electricity at the time of the contact with the boy, but the evidence is wholly lacking to show that this was due to any negligence on the part of the defendant. The defendant had a right to construct its trolley line in a manner to enable it to practically operate its cars, having due regard for the safety of the public. It is not suggested that the construction was faulty, but the plaintiff apparently bases his right to recover on the fact, if it is a fact, that the guard wire had, in some manner, become charged with electricity. The real question is whether the defendant owed the plaintiff any active duty under the circumstances. It is claimed by the plaintiff that it was customary for the boys in the neighborhood of this bridge to walk over the girders, but in view of the fact that it would be necessary to climb to get upon them, that a perfectly

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safe sidewalk had been constructed for the accommodation of persons on foot, and that the way over the girders was not unobstructed, was the duty imposed upon this defendant, in the exercise of reasonable care, to anticipate that its wires, even if charged with electricity, would be dangerous? They were entirely out of the reach of persons using the street and the sidewalk in the ordinary and orderly manner, and it was only when the plaintiff had gone out of his way and had climbed into a position of danger, independently of the wires, that he was exposed to contact with them. We are of opinion that the defendant was not bound to anticipate this danger, and especially so as the guard wire was not designed for the purpose of carrying a current of electricity, but was for the purpose of protecting the wire which did carry the current, and the usual precautions, by way of inspection, had been taken, to see that there was no leakage of the current, from the trolley wire to the guard wire. The guard wire was not intrinsically dangerous; the plaintiff was in a position which one of his own witnesses testified he (the witness) would not dare go if the policeman was around; the negligence, if any, was passive and not active, of omission and not of commission. The case comes, therefore, within the rule of *Larimore v. Crown Point Iron Co.*, 101 N. Y. 391, and the motion to dismiss the complaint should have been granted. The mere fact that boys had been known to pass over the girders of this bridge, or even that the plaintiff has been able to find one or two other boys who have been burned, does not constitute such a public use of these girders as a means of crossing the bridge as to impose upon the defendant the high degree of care contended for by the plaintiff, and which is necessary to sustain the cause of action. In *Byrne v. N. Y. C. & H. R. R. C.*, 104 N. Y. 362, the court sustained a charge of the trial court that if the jury "came to the conclusion that the right of passage (over the tracks of the company) was there exercised by the public, as claimed by the plaintiff, notoriously and constantly, previous to and at the time of the accident, then they were required to deter-

mine the amount of care and prudence which the defendant was required to exercise in approaching and crossing the alley," but this affords no authority for holding that the defendant is called upon to take notice of the fact that boys, in the absence of a policeman, have climbed upon and passed over the girders of a bridge at some time, and to impose upon the defendant the active duty of actually preventing the guard wire becoming charged with electricity. In the Larmore case, *supra*, where the plaintiff was injured by a defective machine, the court say: "The precise question is whether a person who goes upon the land of another without invitation to secure employment from the owner of the land, is entitled to indemnity from such owner for an injury happening from the operation of a defective machine on the premises not obviously dangerous, which he passes in the course of his journey, if he can show that the owner might have ascertained the defect by the exercise of reasonable care. We know of no case which goes to this extent." While the accident involved in this action occurred upon the highway, and upon the bridge which belonged to the public, the defendant was lawfully occupying the bridge for the purpose of operating its railroad, and the plaintiff cannot be said to have been invited, either by the defendant or the public authorities, to make use of the girders in passing over the bridge. The plaintiff is in no position, therefore, to demand any active care on the part of the defendant under the circumstances of this case. As was said by the court in *Severy v. Nickerson*, 120 Mass. 306: "There is no duty imposed upon an owner or occupant of premises to keep them in a suitable condition for those who come there for their own convenience merely, without any invitation, either express or which may fairly be implied from the preparation and adaptation of the premises for the purposes for which they are appropriated." The highways being appropriated to the use of the public, consistently with the mutual rights of all, they are to be used in a reasonable manner, and the defendant could not be held to any different liability, under the circumstances of this case, than it would be if it were the owner of this bridge.

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In the case of *Wittleder v. Citizens' Electric Illuminating Co.*, 7 Am. Electl. Cas. 581, 47 App. Div. 410, 50 id. 478, the plaintiff was injured by contact with a high voltage electric light wire strung and maintained within a few inches of the stairway leading to an elevated railroad station. The plaintiff was a boy about ten years of age, and was, at the time of the accident, at play upon the stairway. The stairway belonged, not to the defendant, but to the elevated railroad company, and being designed for the use of the public, it was not competent for the court to say, as a matter of law, that the plaintiff was not there by the invitation of the railroad company. The complaint in that action alleged that the defendant "negligently constructed and operated" the wire "within one foot of, and unlawfully and dangerously near, the platform," and that it "was not sufficiently nor properly nor carefully insulated nor covered nor protected," while in the case at bar there is no evidence of any negligence in the construction, but the fault is alleged in that the guard wires had, through negligence, become charged with electricity. This was, at most, a mere passive negligence, as to which the plaintiff has no right, under the circumstances, to complain. In the case cited (50 App. Div. 481), the court points out that "in the present case the stringing of a live electric wire, contact with which will inflict severe injuries, if it does not kill, in such close proximity to a thoroughfare along which large numbers of people pass, who are liable to come in contact with it, is an act so dangerous in character and so liable to inflict injury as to remove the case from the authority of those cases exempting from passive negligence, and place it in the category of active negligence." This is quite a different case from that presented in the case at bar, where the wire which caused the injury was designed to be a dead wire, and which was removed some fourteen or fifteen feet from the passageway which was open to the public, and which could only be reached by climbing upon the superstructure of the bridge. If this wire, through some accident (and it may have been through

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the negligence of some one other than the defendant, so far as the evidence shows), became charged with electricity, it did not violate any duty which the defendant owed to the plaintiff under the circumstances disclosed by the evidence, and the motion to dismiss the complaint was properly granted.

The order appealed from should be reversed.

All concurred, except BARTLETT, J., absent.

Order vacating order dismissing complaint reversed, with costs.

NOTE.—See note 2 at end of Part III.

JOHN SCHULTZ V. FARIBAULT CONSOLIDATED GAS AND ELECTRIC COMPANY.

Minnesota Supreme Court, December 21, 1900.

(82 Minn. 100.)

INJURY BY ELECTRIC SHOCK.

Circumstances held to warrant a finding by a jury that a shock sustained by a traveler in a street was due to the negligent manner in which an electric light company maintained its wires as they passed from a transformer upon a pole, down through a gas-pipe extending along the pole and thence under a sidewalk to a building.

Appeal from order of District Court, Rice County, entered upon a verdict of \$7,200 for plaintiff, denying defendant's motion for a new trial.

Ansen L. Keyes and Lafayette French, for appellant.

Batchelder & Batchelder, for respondent.

LEWIS, J.: Action to recover for personal injuries alleged to

have been received from electric shocks produced by the negligent construction of defendant's electric light plant. Verdict for plaintiff, and defendant appeals from an order denying its motion for a new trial.

Defendant had erected a pole at the edge of the sidewalk and in front of the south line of the opera house on the east side of Main street in the city of Faribault. On the top of this pole was placed an electrical transformer, which received a current of 1,040 volts, and transmitted the same into currents of less power, as required for lighting purposes. There were two clusters of wires, consisting of five each, passing down from the transformer, each cluster entering a gas pipe of about one inch in diameter, which pipes were about ten feet in length, and were attached to the side of the pole, and entered the ground at its base. These pipes were for the protection of the wires. From the base of the pole the pipes containing the wire were continued under the sidewalk into the basement of the opera house, and by this means the house was lighted. There were also two wires running from the transformer to the porch, through which the porch was lighted. On the evening of October 29, 1899, plaintiff drove up close to the sidewalk in front of the opera house with a team of horses and a wagon loaded with flour. Stopping, the wagon stood directly in front of the opera house door, and the team to the south opposite the south post of the porch, which post stood in the edge of the sidewalk next to the street gutter. Leaving the team unhitched, he went upstairs. Returning, he jumped up on the load by stepping on the hub of the rear wheel, took his position in front, sitting down, picked up the lines, and claims to have immediately received an electric shock which caused him to fall from the load to the sidewalk. Getting up, and noticing that his horses were down, he started to unhitch them, and, passing to their heads, took hold of the bridle bit, and received another shock, which it is claimed caused paralysis of his left arm. In support of its motion for a new trial there are three propositions presented on this appeal by appellant: First,

no proof of negligence on part of defendant, and that the verdict was not justified by the evidence; second, newly-discovered evidence material for the defendant, which it could not, with reasonable diligence, have discovered and produced at the trial; third, excessive damages, given under the influence of passion and prejudice.

1. The specific act of negligence charged in the complaint is that the electric wires and attachments, which were intended to convey electricity from the pole to the opera house, were so defective and negligently constructed and arranged that the currents of electricity passed into and along the ground next to the sidewalk to such an extent that plaintiff became injured by coming into contact with the same. The defense is based upon the following propositions, which it is claimed were conclusively established at the trial: First, that the force used through the wires running down the post was only 52 volts, and that such force would not injure a human being; second, that the ground is always neutral, and cannot be charged with electricity to such an extent as to injure any one; third, that the electrical attachments and connections were, at the time of the accident, in proper condition, and no electricity could, in any event, have passed into the ground where plaintiff received the shocks. It may be admitted that a human being may receive a current of electricity of 52 volts, and not be injured. It may also be admitted that, as a general thing, the earth is neutral, and that, if a live wire be deep enough to reach the permanent moisture, the electricity will be so dissipated and absorbed as to be harmless to a person standing near,—as in the case of a lightning rod. But, even with these concessions, does it conclusively appear that plaintiff was not injured as he claims? It was conclusively established that plaintiff and his team received electric shocks at the place and at the time stated. It was also shown that other horses on other occasions received similar shocks at the same place. It was shown that the electrified ground was confined to the space between the post and

the porch along the gutter. There was evidence reasonably tending to prove that, as soon as the wires on the post were cut, the horses got up. So the question is, if it was not electricity which caused the plaintiff and the horses to fall, what was it? And, if it was electricity which caused the disturbance, where did it come from? There was no evidence reasonably tending to show that it came from the wires of the other company, and there was evidence tending to show that it came from the wires of defendant company. The fact of the electric shocks being established under the circumstances noted, it reasonably follows that those shocks were occasioned by defendant's system. The only alternative is that they were caused by something unknown. Does it appear from the record that the facts upon which the experts based their reasoning were conclusively established by the evidence? We think not. It was a question for the jury to determine whether the testimony as to the condition of the transformer, the insulation, and number of volts actually carried was true. In arriving at a result the nature of the shock, the place, the cutting of the wires, the former defective condition, the credibility of the witnesses, the fairness, skill, and experience of the experts, and the absence of proof of any other cause, were all matters to be considered; and, if the result indicates that the jury must have considered the testimony of the experts as untrue or untrustworthy, there is nothing in the record to challenge such conclusion. In view of the evidence, it is not only possible, but probable, that, if 52 volts only passed down the post, and if that amount, in charging the ground, could harm no one, then the transformer was out of order, and more than 52 volts reached the ground. If it is true that the insulation of the wires within the pipes was perfect, then the electricity escaped down the post some other way not explained. If the total amount of volts carried from the transformer were not sufficient to harm a person when within its circuit, and if there was not short-cut circuit from the post through the mud and water of the gutter to the opera house porch, then the mud and

water at that point had become heavily charged with the constantly escaping current of either low or high degree, and plaintiff was injured by coming into contact with it. It is well known that a substance heavily charged with electricity will cause an electric shock when coming into contact with a person, even if such person be standing upon a nonconducting substance, as dry wood. The shocks could not have occurred in this case if the earth had been neutral, and had absorbed the current from the post as rapidly as discharged. If the ground directly under the moist or wet surface were hard and dry, it would give more resistance, and the tendency would be for electricity to accumulate through those channels affording the least resistance—in this case the moist surface. And, if such were the condition of the gutter, a shock could readily be received by either horse or man standing with one foot within the gutter and one foot upon dryer ground. If the plaintiff could not have received a shock while perfectly insulated upon the load of flour, then he was not perfectly insulated, but came in contact with the ground through the wagon, harness, and wet sacks and blankets upon which he sat; and the evidence indicates such to be the case. From all the circumstances we must hold that the jury were justified in finding that the injury was sustained, and that defendant was the cause of it.

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NOTE.—See note 2 at end of Part III.

MARIA CAGLIONE, as Administratrix, etc., of PAULO CAGLIONE,
Deceased, Respondent, v. MOUNT MORRIS ELECTRIC LIGHT
COMPANY, Appellant, Impleaded with LOUIS K. OTTZ.

New York Supreme Court, Appellate Division, First Department, December, 1900.

(56 App. Div. 191.)

DEATH BY SHOCK FROM ELECTRIC LIGHT WIRE—DEGREE OF CARE.

A corporation which for its own purposes undertakes to bring into the streets of a city a substance known to be as dangerous as electricity, is bound to take all the care that a reasonable person can take to see that it does not escape in such a way and under such circumstances as to be dangerous to human life.

An electric light wire attached to an iron bar projecting from an iron store front over an iron awning, after being detached from its lamp, was allowed to hang for several months, during which time sparks had been seen to issue from the wire and the awning had been burned by the electricity. Plaintiff's intestate, the occupant of a fruit store next adjoining, discovered that the awning was on fire, and in endeavoring to put it out, touched the iron store front and fell dead.

Held, that the questions of negligence and contributory negligence were properly submitted to the jury.

Cases of this series cited in opinion: *Wittleder v. Citizens' Elec. Illum. Co.*, vol. 7, p. 581; *Clarke v. Nassau Elec. R. Co.*, vol. 6, p. 234; *Jones v. Union Ry. Co.*, vol. 7, p. 447.

Appeal by defendant from judgment of Supreme Court, entered upon the verdict of a jury and from order denying motion for new trial upon the minutes.

Henry J. Hemmens, for the appellant.

Charles G. F. Wahle, for the respondent.

RUMSEY, J.: The action was brought to recover damages for the negligent killing of the plaintiff's intestate. The defendant

is a domestic corporation engaged in the business of electric lighting in a portion of the city of New York. Its wires extend through that portion of the city where it furnishes light, and it was usual to send through them a current of electricity amounting, as its engineer says, to between 1,450 and 1,550 volts, which was shown to be of sufficient strength to kill any person who was so unfortunate as to receive it. Up to the month of January, 1898, the defendant had maintained an arc light upon its circuit at No. 857 Ninth avenue. This light was hung from an iron bar which extended out about three feet in front of the store where it was in use. The electricity was brought to it through wires which were fastened to the framework upon which the lamp hung. In that month, the tenant of the store for whom the defendant had maintained the light, vacated it, and the lamp was removed, leaving the iron bar and the wires through which the electricity had been conducted to the lamp. In just what condition the wires were left does not appear, but that they were not secured, but were permitted to hang down from the supports to which the lamp had been fixed, is not denied. It is proved, and not disputed, that after the lamp had been removed sparks were seen to issue from these wires from time to time, and the awning, against which the wires sometimes struck, was burned by the electricity given off by them. Just when this condition came to exist does not appear, but it is clear that it had continued for some time before the month of September, 1898. Whether the defendant or its men had become aware of this condition of the wires was not made to appear. It did appear, however, that for some weeks before the injury to the plaintiff's intestate the wires had been in such a condition that, under certain circumstances, electricity to a greater or less extent had been given off, so that persons about there had received shocks from it. The front of the store above which the wires were fixed was of iron, as was also the framework upon which the awning was hung.

The plaintiff's husband was the occupant of a small fruit store at No. 855 Ninth avenue, next adjoining the building where these wires were hanging. On the night of the 2d of September, 1898, he was sitting with a friend in front of his store, when turning his head he saw that the awning in front of No. 857 was on fire; he uttered an exclamation, sprang up, ran to the store and attempted to blow out the fire. As he did so he threw out his right hand and at once fell dead, having been killed by a current of electricity passing through his body. The evidence warranted the finding that the current had been transmitted through these wires to the iron framework of the awning, and thence to the iron front of the store, and as Caglione put out his hand he probably touched the store front and was killed. It was for this killing that the plaintiff brought this suit.

There can be little doubt as to the duty of the defendant with respect to the electricity which it had for sale. It undertook to furnish electricity for lighting purposes by means of wires strung through and along the public streets. It was bound to know that a current of electricity of so great a force as its necessities required it to use was, if it escaped, dangerous to human life. It was bound, therefore, to use all the care which the handling of so dangerous an element would require, and especially where that dangerous element was carried along the streets. It is not necessary to consider whether the mere fact that the electricity was permitted to escape establishes of itself a presumption of negligence or not. No such proposition of law was laid down by the learned trial justice. The jury were told that there was no imputation of negligence resting upon the defendant because the wires were left there; that the only question was whether they were left in such a condition as a prudent and a careful person would have left them, considering the surrounding circumstances, and they were also told that the question for them to decide was, did the defendant in this case exercise ordinary care in the conduct of its business, and whether it has acted

as carefully as a prudent person would have done for the purpose of preventing injury which would result from a lack of proper care on its part in keeping this current within proper bounds.

The law undoubtedly is that when a corporation for its own purposes undertakes to bring into the streets of a city a substance which is known to be as dangerous as electricity, it is bound to take all the care that a reasonable person can take to see that it does not escape in such a way and under such circumstances as to be dangerous to human life. *Wittleder v. Citizens' Elec. Illum. Co.*, 7 Am. Electl. Cas. 581, 47 App. Div. 410; *Clarke v. Nassau Elec. R. R. Co.*, 7 Am. Electl. Cas. —, 9 App. Div. 51; *Jones v. Union Ry. Co.*, 7 Am. Electl. Cas. 447, 18 App. Div. 267. The defendant certainly had no reason to object to the statement of the law as given to the jury by the learned trial justice. It did not impose too great a burden of duty upon the defendant as it was given to the jury, and we are not disposed to say that it would have been wrong even if a more stringent rule had been laid down as to the nature and extent of the defendant's duty. Upon the evidence the jury would have been warranted in finding that from the month of January to the month of September, 1898, these wires had been left by the defendant in such a condition that by the constant motion of them against the awning, the insulation had been worn off so that whenever the electricity was turned through them it escaped to the framework of the awning and the front of the store, and they certainly would have been justified in finding that the defendant was guilty of negligence in permitting the electricity to escape.

The defendant claims that the plaintiff's intestate was guilty of contributory negligence. It claims that Caglione had been warned that the sparks which had been seen there were due to the electricity escaping from the wires, and that he had been told it was dangerous to approach when they were giving it off. The question of the contributory negligence was fully and properly submitted to the jury who have found for the plaintiff, and we see no reason to disturb their conclusions.

It was said that Caglione was a trespasser in attempting to blow out this fire, and in putting his hand against the front of the store in his efforts to do so. If he was a trespasser it is a matter of no importance to this defendant. *Wittleder v. Citizens' Elec. Illum. Co.*, 7 Am. Electl. Cas. 581, 47 App. Div. 410. So far as it was concerned, Caglione was not guilty of a trespass at all. He was on a public highway and he was doing that which any citizen would have been justified in doing, and the fact, if it were a fact, that he went upon the stoop of the store of a person who had not invited him there was no justification for the act of the defendant in turning into the highway so great a current of electricity as to cause the death of persons who come in contact with it. The verdict was clearly justified by the evidence. We have examined the exceptions taken to the rulings of the court during the trial and we can see no error in any of them. The result of the whole case is that the judgment and order must be affirmed, with costs.

VAN BRUNT, P. J., PATTERSON, O'BRIEN and McLAUGHLIN, JJ., concurred.

Judgment and order affirmed, with costs.

NOTE.—See Mr. Keasbey's notes, *ante*, pp. 556, 561; also note 2 at end of Part III.

SARAH A. ROWE v. NEW JERSEY TELEPHONE COMPANY AND HUDSON COUNTY ELECTRIC COMPANY.

New Jersey Supreme Court, Feb. 25, 1901.

INJURY BY SHOCK FROM ELECTRIC WIRES—JOINT LIABILITY.

(Head-note by the Court):

One of the defendants maintained in a public street a line of wires carrying a harmless current of electricity, and the other defendant maintained in the street, below that line, a transverse line of wires, carrying

a dangerous current. There were no guards to prevent one of the upper wires, that fell, from coming in contact with the lower wires, and thus conducting their dangerous current down to the surface of the street. *Held*, that the absence of such guards would sustain a finding that both defendants had neglected their duty to travelers on the highway.

Under the circumstances of this case, the question whether a boy walking along the street was guilty of negligence in failing to avoid an electric wire lying across his path, was for the jury.

Cases of this series cited in opinion: *Anderson v. J. C. Elec. L. Co.*, vol. 7, p. 557.

Verdict for plaintiff. Rule to show cause why new trial should not be granted. Verdict set aside conditionally.

Van Buskirk & Parker, for plaintiff.

Harry S. White, for defendant Telephone Co.

Charles W. Fuller, for defendant Electric Co.

DIXON, J.: Between 7 and 8 o'clock in the evening of August 5, 1899, Clarence D. W. Rowe, a boy about 12 years old, while walking along the sidewalk of Thirty-fourth street, in Bayonne, struck his foot against a wire charged with electricity, and was instantly killed. This suit was brought by his administratrix to recover for the pecuniary loss resulting from his death to his mother, sister, and two brothers. The jury in the Hudson Circuit awarded the plaintiff \$5,126, and the defendants now apply for a new trial. The wire touched by the boy belonged to the New York & New Jersey Telephone Company, but the current of electricity that killed him came from the wires of the Hudson County Electric Company. The evidence shows that a little while before the accident a squall had passed over the neighborhood, during which the telephone wire had been broken, and had fallen upon the wires of the electric company, beneath it, which were strung at right angles to the telephone wires, and thus it carried the current from them to the ground.


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The first question for consideration is whether any circumstances were shown on which it was permissible for the jury to find that the defendant companies, or either of them, had been guilty of negligence in the premises. We think the omission of the companies to construct guards between their lines at the place where they crossed, so that, if an upper wire broke, it would not come in contact with the heavily charged wires below, was a fact on which a finding of negligence in each can be supported. In view of the dangerous nature of a wire charged with a strong current of electricity, it is entirely reasonable to hold that corporations using the public highway for wires that may be so charged should exercise a high degree of care to keep the wires where travelers will not be likely to come in contact with them. *Anderson v. Jersey City Elec. Light Co.*, 7 Am. Electl. Cas. 557, 63 N. J. Law, 387, 43 Atl. 654. Where, as in the present case, a line of telephone wires, carrying normally a harmless current, is crossed beneath by a line of wires carrying normally a deadly current, a guard running parallel with the lower line, and between it and the upper, would certainly afford additional protection to travelers on the street below, should a break happen in an upper wire. We perceive no reason for deciding that juries may not hold, in proper cases, that such a safeguard is due to the public. But, assuming that such a guard may be required, we must consider whether the duty of providing it may be imposed on both companies. The obligation of the electric company may readily be indicated. The telephone company's system was first erected, and was in operation when the electric company constructed its line. The latter company therefore took its privilege of using the street subject to the fact that the telephone wires were there crossing its route. In view of this fact, it placed its wires below, and introduced the deadly current, thus making dangerous the wires of the telephone company which before had been harmless. Against the danger thus created by the electric company, its duty plainly required

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it to guard by all reasonable means. The obligation of the telephone company is not so palpable, but still we think it may be deduced from settled principles. Every person using the highways is bound to exercise reasonable care to protect others from harm through his use. In case the use is continuous, the degree of care required will not be governed by the condition of the highway at the time the use began, but will change as that condition changes, and must keep pace with the circumstances as they occur. A corporation authorized by law to occupy the public streets with appliances for its business holds the privileges subject to such regulations as are reasonably necessary for the common use of the streets for all lawful purposes. *North Hudson Co. Ry. Co. v. Mayor, etc., of City of Hoboken*, 41 N. J. Law, 71; *Trenton Horse R. Co. v. Inhabitants of City of Trenton*, 53 N. J. Law, 132, 20 Atl. 1076, 11 L. R. A. 410; *Consolidated Traction Co. v. City of Elizabeth*, 58 N. J. Law, 619, 34 Atl. 146, 32 L. R. A. 170. When, therefore, the electric company, under legislative sanction, placed their structures in the street, a new state of things appeared, with reference to which the care demandable from the telephone company must be gauged. It at once became the duty of that company to adopt reasonable measures to protect travelers from danger attending its own use of the street as occupied by the electric company's system. From this it follows that, if a guard such as is above mentioned be a reasonable means of preventing danger likely to arise from the breaking of the company's wires, it was the duty of the company to provide the guard, or see that it was provided, and a failure to do so was negligence. We are therefore of opinion that the finding of the jury holding both defendants guilty of negligence may be supported.

But the defendants insist that contributory negligence on the part of the boy was conclusively shown. At the time of the accident the boy was walking with a Mr. Moritz, who held an umbrella over them, as it was raining. The sidewalk was flagged in the center, but between the flagging and the curb was a space



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four to six feet wide, covered with grass. The man and boy walked on the flagging, the former being nearest the curb. As they approached the place of the accident, Mr. Moritz saw a line of small electric lights, about the size of a pea, in the grass, three or four inches from the curb. They extended ten or fifteen feet in length; but as they were not near the flagging, and no hindrance was perceived across the path, the man and boy went on, and then both received a shock, which knocked them down and killed the boy. Mr. Moritz swears that he could not see the wire, and we may assume that the boy did not; for, in the rain, the flagging and the wire lying upon it would scarcely differ in color, and the dusk of the evening would render discernment more improbable. These circumstances evidently presented questions as to the boy's negligence which fell within the province of the jury.

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NOTE.—See note 2 at end of Part III; also Mr. Keasbey's note, *ante* p. 547.

WILLIE MACON, by next friend, v. PADUCAH STREET RAILWAY
COMPANY AND PADUCAH ELECTRIC LIGHT COMPANY.

Kentucky Court of Appeals, April 26, 1901.

INJURED BY ELECTRIC SHOCK—GROSS NEGLIGENCE.

A boy twelve years old came in contact with a live wire which hung from one of the posts used to support defendants' wires, reaching nearly to the ground, in a street, and was severely injured by an electric current. In an action brought on the ground of negligence, in which \$10,000 damages was asked, the jury awarded the plaintiff \$350, and he appealed.

Held, that persons using electricity for lighting, propelling cars or other business, must exercise the highest degree of care for the protection of all persons in all places where such persons have a right to be.

Held, error to charge the jury that gross negligence is either an intentional wrong or such a reckless disregard of security and the right as to imply bad faith.

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The proof showed with certainty that the wire had hung where it was for two or three weeks, and there was evidence that defendants' servant or agent knew of it. *Held*, that the ownership of the wire, and the way in which it became charged with electricity, were immaterial; that the wire was dangerous to the public, and if the defendants knew, or with due diligence, should have known of its condition, it was gross negligence to leave it there.

There was evidence that plaintiff seized the wire after being warned of the danger. *Held*, that whether or not this was the fact, and if it was, the question of contributory negligence, were for the jury to determine.

Cases of this series cited in opinion: *McLaughlin v. Louisville Elec. L. Co.*, vol. 6, p. 255; *Overall v. Louisville Elec. L. Co.*, vol. 7, p. 521; *Thomas' Adm's v. Maysville St. Ry. Co.*, vol. 7, p. 587; *Schuritsor's Adm'r v. Citizens' Gen. Elec. Co.*, vol. 7, p. 571.

Appeal from Circuit Court, McCracken County.

Judgment for plaintiff for only a part of the amount claimed, and he appeals. Reversed.

Bishop & Hendricks, for appellant.

GURRY, J.: This action was instituted by the appellant against the appellees, Paducah Street Railway Company and Paducah Electric Light Company, to recover damages for injury sustained by the gross negligence of the defendants. The substance of the negligence complained of is: That the defendants had established various posts and overhead wires along and over the streets of the city of Paducah, and were engaged in furnishing electric power to run and operate a street railway in said city, and to furnish lights to the inhabitants thereof. That about April 26, 1898, the defendants had, at or near the corner of Sixth and Norton streets, and as part of said electric system, a post, and about forty feet from the corner of Sixth street stood another post, and to these posts were attached electric wires charged with electricity, and were being used by the defendants in the transaction of their business; and at or near said post and about forty feet from the corner of Sixth and Norton streets, on the south side of Sixth street, the said defendants suffered

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and permitted what is known and commonly called a "live wire"—that is, a wire fully and heavily charged with electricity—to hang down from one of their posts so operated and used by them, to and near the ground on said Sixth street. That the said "live wire" so charged with electricity was dangerous to the lives and safety of all persons traveling along or across said street. That plaintiff was an infant about 12 years of age, and was sent by his mother to a neighbor's, and it was necessary for him to pass under or near said "live wire," and while so engaged in passing along said public street as aforesaid, without any negligence on his part, he came in contact and collision with said "live wire" so hanging down from defendants' post to, on, or near the surface of said street and ground, and was thrown by the electric current imparted to him from said "live wire" to the ground, and was terribly burned and injured, so as to make him a cripple for life, and was burned to the hollow of his body, his thumb burned off entirely, and his body otherwise burned and injured. It was further alleged that the said live wire was by defendants negligently suffered and permitted to hang down from the post aforesaid to the ground so as to be exceedingly dangerous to persons traveling thereon, and that plaintiff suffered the burns and injuries in consequence of the gross negligence of both the defendants in suffering and permitting said live wire to so hang as aforesaid; that each and both defendants knew of the dangerous condition of said live wire, or could have known by ordinary diligence, and could have by the use of ordinary diligence, or any diligence, repaired said wire, removed and placed same at such elevation from the ground as that no harm could or would have resulted to any one; that it was their duty to do so, and the defendants well knowing the dangerous condition of the live wire, permitted it to remain in said condition for more than two weeks before said injury; that plaintiff was damaged by the burns and injuries aforesaid in the sum of \$10,000. The answer may be treated as a denial that they suffered the live wire charged with electricity to hang down

as charged by plaintiff, or that they knew, or had reason to know, that any live or other wire at the time mentioned was hanging from a wire used in their electric light or power plant at or near the place mentioned by plaintiff; nor did they have any information that such a wire was so hanging; that, if such wire had been hanging from their system so as to touch the ground, it would have manifested itself in the operation of their electric plant; that after the accident complained of they discovered the wire hanging from the electric wire which was a part of their system, but that said wire so hanging down within a few feet of the ground was not a wire used, or ever had been used, or could ever have been used in the operation of defendants' business; but that said wire was a loose wire, which had been used by the East Tennessee Telephone Company in their system of operating an electric telephone, and that same had been cut by the said telephone company, or some stranger not connected in any way with these defendants, and had been allowed to fall across the wire belonging to these defendants, without their knowledge or consent; and that defendants did not know or had no information that said wire was so hanging; and they deny that said wire was there by the carelessness or negligence of defendants. Defendants admit that plaintiff was injured by coming in contact with said wire, but aver that he willfully and knowingly caught hold of said wire with his hands well knowing, and after being informed, that, if he did so, it would shock and burn him; that he was informed immediately before he caught hold of the wire that, if he did so, it would shock and burn him, but he stated that he was not afraid of same, and against the protest and advice of his friends he wilfully caught hold of said wire, and was thus burned; which negligence is pleaded in bar of plaintiff's right to recover. It is further stated in the answer that "defendants had no knowledge or information as to whether said wire had remained hanging towards the ground for two weeks or not." It is further denied that plaintiff was damaged in the sum of \$10,000, or any other sum. By an amended peti-

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tion it is alleged, in substance, that the live wire which injured plaintiff was either a wire which had been used by the East Tennessee Telephone Company, or by some other person unknown, or else it was the wire of defendants; that one or the other of these things is true, but plaintiff does not know which. The amended petition also repeats the other averments of negligence charged to the defendants. The reply of plaintiff is a traverse of all the defensive averments in defendants' answer. By a further amended petition it is alleged that defendants' electric system in the city of Paducah, and especially at the point where the wire hung down with which the plaintiff came in contact, was defectively and insufficiently insulated. They say that especially at the time and place where the said hanging wire was that caused the injury to plaintiff, the place of contact between the wires was not insulated at all; and, if it was insulated, it was defectively and insufficiently done. It was further alleged that defendants could have kept said wires at the place of contact so insulated as to have made hurt or injury to the plaintiff impossible; that plaintiff had a right to believe that defendants had performed their duty; and that his taking hold of same, if he did so, was not contributory negligence on his part, as he is and was a boy of only 12 years of age at the time. The answer to the amended petition again denies negligence, or that it omitted to do anything which it was its duty to do. It denies that its system of wires was insufficiently insulated. It says where plaintiff was hurt the wires were insulated in the most approved and scientific manner. It is denied that defendants could have kept said wires at the place of contact where the injury occurred so insulated, as to have made hurt or injury to the plaintiff impossible. The contributory negligence of plaintiff is again pleaded and relied on. Upon final trial, the jury returned the following verdict: "We, the jury, find for the plaintiff, Willie Macon, in the sum of \$350.00. T. S Long, One of the Jury." Thereupon the court rendered a judgment in favor of plaintiff against

the Paducah Street-Railway Company for said sum of \$350, with 6 per cent. interest, and his costs. The defendants filed grounds and moved for a new trial, which motion, however, was afterwards withdrawn. The plaintiff also filed grounds and moved for a new trial. The substance of the grounds relied on is the admission of improper evidence against plaintiff, and rejection of competent evidence offered by the plaintiff; error of the court in giving instructions 1, 2, 3, 4, and 5, and in refusing to give instructions "v," "w," "x," "y," and "z." Plaintiff's motion for a new trial having been overruled, he prosecutes this appeal.

Instruction No. 1 defines ordinary care to be such as is commonly exercised by persons of ordinarily prudent habits and placed under like circumstances, and therefore ordinary negligence is the want of ordinary care. Gross negligence is a higher degree of negligence, and is either an intentional wrong or such a reckless disregard of security and the right as to imply bad faith. Instruction No. 2 tells the jury that the burden of proving the negligence charged is on the plaintiff. No. 3 should not have been given. It is open to the construction that, unless the defendants were the owners of the live wire in question, plaintiff could not recover, and it is open to other objections not necessary to state. No. 4 should not have been given. We do not think that the petition specifies any sum expended for medical service, and, if this is true, no recovery should have been allowed for medicine or medical attention. The court also allowed for loss of capacity to perform the kind of labor for which he was fitted. This was error. It is not for the court or jury to undertake to determine the kind of labor for which he was or might become fitted. Instruction "z" is substantially correct, and should have been given. The definition given by the court of gross negligence in Instruction No. 1 is erroneous, and in conflict with the opinion of this court in *Railroad Co. v. McCoy*, 81 Ky. 411. In that case the court below gave the following instruction: "The court instructs the jury that gross neg-

ligence is that degree of negligence which indicates intentional wrong to others, or such a reckless disregard of their security or rights as to imply bad faith." This court expressly held that the foregoing instruction was erroneous, and, recognizing that a similar instruction had been sustained in the case of *Railroad Co. v. Robinson*, 4 Bush, 509, expressly overruled the last-named case in so far as it sustained such a definition of gross negligence. In further discussion of the question this court referred to the decision of *Railroad Co. v. Herrick*, 13 Bush, 127, which said "that punitive damages were recoverable if the proof showed that the company failed to use such diligence in keeping its railroad bridge in repair as careless and inattentive persons usually exercise in the prosecution of the same, or of business of like character;" that "the absence of slight care in the management of a railroad train or in keeping a railroad track in repair is gross negligence;" and that "it was not necessary to show the absence of all care, reckless indifference, or intentional misconduct, to make out gross neglect. These alleged definitions of gross neglect are, rather, the statement of instances showing gross neglect than a definition embracing every state of facts constituting such neglect. It is certainly true, in the management of a railroad, that the absence either of all care, or the loosest degree of care, or of slight care, is gross neglect; but it does not follow that the presence or exercise of slight care in the general sense and ordinary application thereof in matters of little or no peril to life negatives the existence of gross neglect charged in the management of a railroad where human life is constantly in more or less danger." The court further said: "In the management of a railroad, or any department thereof, gross neglect is the failure to take such care as a person of common sense and reasonable skill in like business, but of careless habits, would observe in avoiding injury to his own person or life under circumstances of equal or similar danger to those which may be under investigation." The definition of ordinary care given in said Instruction No. 1 is erroneous in this case for the reason

that it has been repeatedly held by this court that persons using electricity either for lighting or for propelling cars, or other business, must exercise the highest degree of care for the protection of all persons in all places where such persons have a right to be. See *McLaughlin v. Louisville Elec. Light Co.* (Ky.), 6 Am. Electl. Cas. 255, 37 S. W. 851, 34 L. R. A. 812; *Overall v. Louisville Elec. Light Co.* (Ky.), 7 Am. Electl. Cas. 521; 47 S. W. 442; *Schweitzer's Adm'r v. Electric Co.* (Ky.), 52 S. W. 830; *Thomas' Adm'r v. Maysville St. Ry. Co.* (Ky.), 7 Am. Electl. Cas. 587, 56 S. W. 153. It will thus be seen that the court erred as to Instruction No. 1. The jury were told in No. 2 that the burden is upon the plaintiff to prove negligence. This court has often condemned instructions stating upon whom the burden of proof rested, or similar expressions. No. 5 is substantially correct. The evidence in this case tends to show that the live wire was fastened at one end of one of defendants' posts used for the purpose indicated in the pleadings, and also wrapped around one of the wires which are called "guy wires," which extend from one post to another. Some of the testimony conduces to show that these wires were for the purpose of preventing the posts from falling down in the event one should give way. The defendants' theory seems to be that the wire in question did not belong to them, or either of them, but was a telephone wire that had once been run along there by a telephone company, and by some means got wrapped around the guy wire aforesaid. The evidence of plaintiff shows that all telephone wires had been removed away from there some time before. It also appears with absolute certainty that the wire in question had been hanging down from defendants' wire for two or three weeks, and there is some evidence tending to show that defendants' agent or servant had actual notice thereof. We are, however, of the opinion that it is a matter of no consequence who was in fact the owner of the wire in question. The negligence of defendants, if negligence at all, consisted in allowing the wire to remain in a condition dangerous to persons using the street.

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It will be readily admitted that a live wire in the position this one was shown to be was extremely dangerous to the public, and, if defendants knew, or could, by such diligence as the law requires of them, have known, of the condition of the wire, it would have been gross negligence on their part to have permitted the wire to so remain. It may be taken as true that defendants did not intend a current of electricity to flow along the guy wires before mentioned, nor intentionally turn such current upon the guy wires, or the wire from which the injury directly resulted. It seems, however, absolutely certain that there was a current of electricity flowing along the wire which the plaintiff took hold of; or, in other words, it was a live wire. No person undertook to state as a matter of fact how the electricity reached the down-hanging wire, nor do we deem it a matter of importance in this case whether it became alive because of a current of electricity reaching the guy wire, or whether it was made alive by some defect in the apparatus or wires or machinery used in propelling the street cars. It is certain that if the wire in question had not been hanging down, the injury would not have occurred. It was for the jury to determine from the facts and under proper instructions as to the degree of negligence complained of as well as to whether or not the wire was in fact hanging down as described by the witnesses, as well as to consider what length of time it had been in that condition. If the evidence adduced is to be believed, it follows that the defendants were guilty of gross negligence, as well as guilty of the failure to exercise that high degree of care which the law requires of electric companies. It was also the province of the jury to determine whether or not plaintiff had in fact been warned of the danger of taking hold of the wire, and, if so, whether, considering his age and capacity, and all the other circumstances as shown by the evidence at the time that he did take hold of it, he was guilty of such contributory negligence as barred his right to recover in this action. For the reasons indicated, the judg-

ment is reversed, and cause remanded for a new trial upon principles consistent with this opinion.

NOTE.—See Mr. Keasbey's notes, *ante*, pp. 556, 561; also note 2 at end of Part III.

J. WINTHROP SIAS v. LOWELL, LAWRENCE & HAVERHILL ST.
RY. CO. ET AL.

Massachusetts Supreme Judicial Court, June 18, 1901.

INJURY BY ELECTRIC SHOCK.

A telephone company maintained its wires on the poles of an electric street railway company, under a contract by which it agreed to assume all risks of injuries to its employes.

An employe of the telephone company, while voluntarily repairing a wire of the railway company, received a shock and consequent injuries.

Held, no cause of action against the railway company.

Appeal by plaintiff from judgment of Superior Court, Middlesex county.

William H. Baker, Edward Lowe, and Rufus P. Tapley, for plaintiff.

Walter I. Badger and Sanford Robinson, for defendants.

HAMMOND, J.: Without considering the question whether the plaintiff was in the exercise of due care, we think a verdict for the defendants was rightly ordered. The pole from which the plaintiff fell was one of the series of poles extending through Emerson and White streets, in Haverhill, and owned by the Haverhill & Amesbury Street Railway Company. By the writing of October, 1897, this company granted to the People's Telephone Company the right to use these poles, among others, "for the purpose of conveying wires and cables," the telephone

company paying a certain consideration therefor, and agreeing to "assume all risks as to any damages which might arise from or to their employes while working on the poles." Upon these poles, at the time of the accident, were two sets of wires, one owned and used by the street railway company, and one by the telephone company. The night before the accident a telephone in a house near White street had burned out. Bunce, a foreman of the telephone company, investigated, and located the "leakage" of electricity as being at the iron pole next to the wooden pole from which the plaintiff fell. He found that the insulation of a telephone wire attached to the iron pole was burned off, and the wire was lying across one of the railway company's guard wires supporting the guard wire running over the trolley. This showed that the guard wire in some way and at some time had become charged, and that there had been "a leakage" of electricity into it, and from it into the telephone wire. The next morning Bunce, with the plaintiff, both being servants of the telephone company, started out "to clear the trouble." He testified that the guard wire over and parallel with the trolley wire had sagged, so that there was danger that the trolley wire might be pushed against it by the trolley of a passing car, and he thought that the "leakage" into the guard wire over which he saw the damaged telephone wire lying might have been caused in that way. This sagging was caused in part by the slackness of the span wire by which it was connected with the poles, and Bunce, with the plaintiff, began to "pull the slack out of the" span wire. After fixing the span connected with the iron pole, they proceeded to the wooden pole. The plaintiff, upon being asked whether he or Bunce should go up the pole, said he would go. He mounted the pole for the purpose of tightening the span wire. He released the span wire from the insulator near the pole, put a strap in which there was a small vise around the pole, then tightened the wire which he held, by means of the vise and strap, and while in the act of attaching the wire to the insulator, received a shock, and fell. It is thus seen that the plain-

tiff was injured while at work upon a wire of the railway company. It does not appear that this was at the request or solicitation of the railway company. It is true that there is evidence tending to show that, so far as respected the rake or cant of the poles, there was an understanding between the two companies that the telephone company would put them in proper shape, but nothing appears as to the wires. It does not appear that the telephone company was expected to repair or meddle with the wires of the railway company, except, perhaps, to keep the poles at the proper rake, or that the latter solicited or allowed the former to interfere with its wires. The plaintiff at the time of his injury was at work, not upon a telephone wire, but upon a wire of the railway company, without its permission, express or implied. While the plaintiff was thus at work, the highest duty the railroad company owed to him was that of not willfully or wantonly injuring him.

There is still less reason for holding the Lowell, Lawrence & Haverhill Street Railway Company answerable. It owned neither pole nor wires. It is true that it supplied the power, and there was evidence tending to show that there was imperfect insulation of its wires, but this was at a point several hundred feet away from the place of the accident, and the evidence failed to show that the injury to the plaintiff was in any way attributable to that condition of its wires, but it tended to show the contrary, inasmuch as the contact which charged the wire, and of which the plaintiff complained, was caused by the sagging of the wire which was above the trolley wire to such an extent as to touch the trolley wire when pushed against it by the trolley of a passing car. Exceptions overruled.

WILL V. EDISON ELECTRIC ILLUMINATING COMPANY.*Pennsylvania Supreme Court, Oct. 17, 1901.***INJURY BY ELECTRIC SHOCK—DEGREE OF CARE—NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE.**

A company using so dangerous an agency as electricity is bound to use the very highest degree of care to avoid injury to every one who may be lawfully in proximity to its wires, and liable to come, accidentally or otherwise, in contact with them; not only to make its wires safe, but to keep them so. Evidence of defective insulation for several weeks, as shown by the wires "spitting fire," held improperly rejected. *Necessity* of going where electric wires are, need not be shown to avoid the charge of contributory negligence; *convenience* is enough.

A person going lawfully where electric wires are, while bound generally to know the danger, has, unless the defective insulation could have been seen with proper effort, the right to presume that they are properly insulated. The question of proper effort is for the jury.

Appeal by plaintiff from judgment of nonsuit of Court of Common Pleas, Lancaster county.

Marriot Brosius and W. F. Beyer, for appellant.

W. M. Hensel, D. McMullen and H. M. North, for appellee.

MITCHELL, J.: Wires charged with an electric current may be harmless, or they may be in the highest degree dangerous. The difference in this respect is not apparent to ordinary observation, and the public, therefore, while presumed to know that danger may be present, are not bound to know its degree in any particular case. The company, however, which uses such a dangerous agent, is bound to know not only the extent of the danger, but to use the very highest degree of care practicable to avoid injury to every one who may be lawfully in proximity to its wires and liable to come, accidentally or otherwise, in contact with them. The defendant, in accord with the common practice of electric companies, recognized this obligation by in-

ulating its dangerous wire. But the duty is not only to make the wire safe by proper insulation, but to keep it so by constant oversight and repair. Appellant at the trial offered to show that this had not been done; that the insulation had been defective for several weeks, as had been shown by the wire "spitting fire" when blown against the corner of the roof. This testimony was excluded, and in that there was error. The case, in this aspect, is analogous to an action against a municipal corporation for injury from a defective highway. The plaintiff is not bound to show direct and express notice of the defect, but may show that it has existed for such a period that it ought to have been known to the authorities; and this raises a question for the jury. The excluded testimony in the present case was relevant and material on the question of the defendant's negligence in that respect, and as such should have been admitted. It was not error, however, to exclude the testimony that the wires had been put there without the consent or against the protest of the lessee or owner of the house. In an action by such lessee or owner for injury by fire or otherwise to the house, the trespass might be admissible, but in the present action it was irrelevant. The wire being there, the question, as between the defendant and the plaintiff, was whether there was negligence in not keeping it in proper repair.

The nonsuit, however, seems to have been entered on the ground of contributory negligence of the decedent. He was lawfully upon the roof in the exercise of his business. It is said that there was no evidence that it was necessary for him to go on the roof to do the painting. No such evidence was required. His convenience was reason enough. It was convenient for him to get at the cornice in that way, and he had a right to do so. He found the wires in his way, and proceeded to prop them up so that he could work under them. Whether the means he took were such as a prudent man should have taken is not so clear that it can be determined by the court. If the weight of the wire, when it fell on him, had been such as to knock him into

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the street, that would have been so clearly his own negligence that the court could have said so as matter of law. But, though he was bound to know, in general, the dangerous nature of such wires, and to use proportionate care in interfering with them, he was also entitled to presume, from the general custom, that they were properly insulated, unless the defect in their covering was visible to such examination as he ought to have made. All these considerations entered into the question of his negligence, and made it one for the jury.

The case of *Smith v. Light Co.*, 198 Pa. 19, 47 Atl. 1123, relied on by appellee, differed entirely from the present in the absence of evidence of notice to the company of the defect. The testimony which should have been admitted here was sufficient to send that question to the jury.

Judgment reversed, and *procedendo* awarded.

NOTE.—See Mr. Keasbey's notes, *ante*, pp. 556, 561; also note 2 at end of Part III.

SALLIE MITCHELL v. RALEIGH ELECTRIC COMPANY.

North Carolina Supreme Court, Oct. 29, 1901.

DEATH BY ELECTRIC SHOCK.

When a city ordinance prescribes the insulation of its wires by an electric light company, absence of insulation is *prima facie* evidence of negligence.

Knowledge by such company of defective insulation must be presumed from its existence for two years to the knowledge of at least two persons.

An employe of a telephone company, while stringing a wire above one of an electric light company, was killed by a shock caused by contact of the two wires at a point where the insulation was gone from the electric wire, thirty feet above the street. There was no evidence that he knew, or by proper care could have known of the defect. *Held*, not chargeable with contributory negligence.

Cases of this series cited in opinion: *Olements v. La. Elec. Lt. Co.*, vol. 4, p. 381; *Newark Elec. Light & Power Co. v. Garden*, vol. 6, p. 274.

Appeal by plaintiff from judgment of Superior Court, Wake County.

This action was brought to recover against defendant company damages on account of the alleged negligent killing of intestate. It was alleged that intestate, while at work upon the line of the Bell Telephone Company in stringing a wire upon its line across and over defendant company's wires, the wire being strung by intestate, came in contact with the wire of defendant company at a point which it had negligently permitted to be and remain uninsulated, and thereby became charged with electricity, which was conveyed into the body of intestate, causing his death. From the evidence of plaintiff's witnesses it appears that intestate was in the employ of the Bell Telephone Company on January 14, 1899. While so employed, he was assisting another employed in stringing a wire upon the poles of the said company, at or near the intersection of Edenton and Blount streets, in the city of Raleigh. The wires of said company were supported upon poles, and were 10 feet higher than the wires of defendant. Intestate was on the north side of Newburn avenue. His fellow employe was upon the pole on the south side. Intestate had the coil of wire on his left arm or shoulder. A rope or hand line had been fastened to the end of the wire, and it passed over a limb and through some trees on the north of the said street, over and across defendant company's wires, and placed in the hands of the employe of the Bell Company's pole, who was drawing it to him for the purpose of stringing the wire, to which it was fastened, upon the pole upon which he had climbed. Intestate was paying out the wire through his hands, and while doing so it came in contact with defendant company's electric wire, and he was "caught" by a current of electricity transmitted to the wire in his hands, and died in a minute—before the wire was cut. Some two years before this occurrence the witness McFarland testified that he and another man

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(Hicks) were putting a 'phone wire across at the same place, and while doing so (but the wire was then drawn across the arm of a pole) Hicks carelessly permitted it to slack, and fall across the electric company's wire, making an abrasion in the insulation two inches wide, and Hicks got "caught" by a current of electricity, but he immediately cut the wire, and released him. This was at the same place where intestate got "caught." He had noticed the place several times in the same condition between the two accidents. Bonner, the electrician, testified: That about 15 minutes after the occurrence he went to the place where this man was killed by a current from the wire of the defendant company, and saw a place on the defendant company's wire where the insulation had been rubbed off, which was the width of a lead pencil. The Bell line was lying in the place where the insulation was rubbed off. That about two years before he had noticed a place where the insulation was rubbed off; it was within 10 feet of this place. Caused by a 'phone wire pulling across the electric wire. It was the same size as the place he saw there the day of the accident, and did not notice but one place which was rubbed off on that day. Several witnesses testified that the proper way for a man who knew his business would have been to have passed the rope or hand line and wire over the arm of a tall Bell pole, and then pulled it across, thus avoiding contact with the electric wire, instead of through the trees, as was done. The ordinance of the city, which was in evidence, is as follows: "Sec. 7. All electric light and power wires, excepting trolley wires for electric railways, must be covered with a durable waterproof insulation not less than two coatings." After the close of plaintiff's evidence (defendant having declined to introduce any), plaintiff requested the court to give certain special instructions, which were refused, and plaintiff excepted. Verdict was rendered for defendant, and plaintiff appealed from the judgment.

J. B. Batchelor, for appellant.

B. L. Gray, for appellee.

Cook, J. (after stating the case): The plaintiff was clearly entitled to have the instructions hereinafter discussed, and prayed for, given to the jury, if not in the exact language, certainly in substance, which does not appear in the charge as given. The defendant company was engaged in the business of manufacturing, producing, leasing and selling light made from the use of electricity, which is the most deadly and dangerous power recognized as a necessary agency in developing our civilization and promoting our comfort and business affairs. It differs from all other dangerous utilities. Its association is with the most inoffensive and harmless piece of mechanism—if wire can be classified as such—in common use. In adhering to the wire, it gives no warning or knowledge of its deadly presence. Vision cannot detect it. It is without color, motion, or body. Latently, and without sound, it exists, and, being odorless, the only means of its discovery lies in the sense of feeling, communicated through the touch, which, as soon as done, becomes its victim. In behalf of human life and the safety of mankind generally, it behooves those who would profit by the use of this subtle and violent element of nature to exercise the greatest degree of care and constant vigilance in inspecting and maintaining the wires in perfect condition. Recognizing this peril to those in its use, or who, in the exercise of their liberty, in passing along the streets of the city, might accidentally come in touch or contact with electric wires, or who, in the management of their business affairs, would have other wires suspended over the street in close proximity to electric wires, the city authorities of Raleigh deemed it proper to require that all such wires should be covered with durable waterproof insulation. The duty imposed under this ordinance was imperative. Its strict observance was necessary for the safety of all. The electric wires must be insulated, and it was no less the duty of defendant company to keep them so at all times and at all places. The nature of the mischief intended to be remedied required it. A failure to comply with this ordinance was *prima facie* evi-

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dence of negligence, and, there being no evidence in rebuttal offered by defendant company, and none appearing from the evidence of plaintiff, it was error in his honor in refusing to give instruction No. 1 prayed for by plaintiff, viz.: "If the jury find from the evidence that the defendant left its wires uninsulated, as stated by the witnesses, this was negligence on the part of the defendant, and the jury will so find." In *Railroad Co. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. Ed. 434, the court held that, where the statute imposed a duty upon a railroad company to fence its slack pits, its failure to do so was evidence of negligence for which it was liable. In the case of *Clements v. La. Elec. Light Co.*, 4 Am. Electl. Cas. 381, 44 La. Ann. 692, 11 South. 51, 16 L. R. A. 43, 32 Am. St. Rep. 348, it is held by the Supreme Court of Louisiana that the failure of defendant company to have the splices on its wires perfectly insulated, when so required to do by the ordinance of the city, was negligence on its part. The ordinance being a contract with each and every inhabitant of the city, its standard of duty was fixed by it, and its failure to comply with it was negligence. Also, to the same effect, it is held in *Tobey v. Railway Co.*, 94 Iowa, 256, 62 N. W. 761, 33 L. R. A. 496, and cases there cited; *Hayes v. Railroad Co.*, 111 U. S. 228, 4 Sup. Ct. 369, 28 L. Ed. 410. "A company maintaining electric wires over which a high voltage of electricity is conveyed, rendering them highly dangerous to others, is under the duty of using the necessary care and prudence at places where others might have the right to go either for work, business, or pleasure, to prevent injury. It is the duty of the company under such conditions to keep the wires perfectly insulated, and it must exercise the utmost care to maintain them in such condition at such places. And the fact that it is very expensive or inconvenient to so insulate them will not excuse the company for failure to keep their wires perfectly insulated. So, one who, in the course of his employment, is brought in close proximity to electrical wires, is not guilty of contributory negligence by coming in contact there-

with, unless done unnecessarily, or without proper precautions for his safety. And where the wires, if properly insulated, would not be a source of danger, such person is only obliged to look for patent defects, and not for latent defects; and a person who touches an electrical wire from which the insulation is worn off, if he does it in ignorance of the nature and condition of the wire, is not negligent." Joyce, *Electric Law*, sec. 445. The evidence in the case at bar shows that defendant company's wires were strung on poles along the same street with those of the Bell Telephone Company. At places, as in this case, one set of wires diagonally crossed the other at a distance of only about 10 feet. Each had a common right, and it was the duty of each to exercise all reasonable precautions for the prevention of injury to the servants who may be sent there in the performance of duty. Each is bound to know that the servants of the other may come in contact with its wires. The fact that defendant company's wire was insulated was calculated to induce intestate to rely upon its safety, even if the wire he was paying out should come in contact with it. *Newark Elec. Power Co. v. Garden*, 6 Am. Electl. Cas. 274, 23 C. C. A. 649, 78 Fed. 74, 37 L. R. A. 725.

We think his honor also erred in refusing the third instruction prayed for, viz.: "There is no evidence of contributory negligence on the part of the intestate of plaintiff, and the jury will therefore find the second issue 'No.'" What is contributory negligence upon a given state of facts, and whether there is any evidence, are questions of law for the decision of the court; and a review of the evidence fails to discover any act done by the intestate which he ought not to have done, or the omission to do any act which he ought to have done. The witnesses testified that the proper way would have been to have conveyed the rope or hand line and wire over the arm of the tall Bell pole not far off (and not through the trees, as was done), which any man who understood his business would have done. But it also appears from the evidence that a similar accident

occurred at or near the same place when the arm of a pole was used, and the wire carelessly allowed to slack and fall upon the electric wire. So, if intestate used a different mode to accomplish his purpose, that act would not necessarily be negligence upon his part. And, having undertaken to use the trees in supporting his wire while conveying it over and across the defendant company's wire, he had a right to presume that the electric wires were properly insulated as required by the ordinance, and it was his duty to look for patent defects only. *Clements v. Light Co., supra*. There is no evidence to show that intestate so managed or mismanaged his wire as to cut through the insulation of defendant company's wire, nor is there any evidence to show that the abrasion in the insulation was seen, or by due care could have been seen, by him. In extent, the evidence shows that it varied from the width of a pencil to two inches, and was suspended 30 feet above the street. It does appear that his wire came in contact with and rested upon the electric wire, but there is no evidence to show that it caused the abrasion in which it rested; nor was there any evidence to show that he knew of its existence. From the fact that it was there, and had been for two years, and had been seen and known to exist there for two years by at least two people (who were witnesses in this case), the court must presume that it was or ought to have been known by defendant company. So, where an electric light company permitted a live wire to remain on the surface of a street for three weeks, and a traveler was injured by contact with such live wire, it was held that the court would presume, after such a period, that the company had notice of the fact, and was liable for the injury. *Joyce, supra*, sec. 450.

The fourth instruction asked was: "There is no evidence of any other cause of death of plaintiff's intestate, except from the electricity coming from the wire of the defendant. Therefore, if the jury find from the evidence that the death of the intestate of plaintiff was caused by the current of electricity passing into his body from the charged wire of the defendant, the jury will find the third issue 'Yes.'" The third issue was, "Was the

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negligence of the defendant the proximate cause of the death of intestate of plaintiff? The negligence of defendant appearing, and no evidence of contributory negligence by intestate, his honor erred in refusing this instruction. There was evidence tending to show that intestate was killed by the electrical current, which clearly appears, and the jury should have been charged as requested.

As there will have to be a new trial, and the questions raised by the other exceptions may not again arise, we think it unnecessary to discuss them.

New trial.

MONTGOMERY, J., *dissenta*.

FLORA I. PAINE, as Administratrix, etc., of GEORGE O. PAINE,
Deceased, Respondent, v. ELECTRIC ILLUMINATING & POWER
COMPANY OF LONG ISLAND CITY, Appellant.

New York Supreme Court, Appellate Division, Second Department, October, 1901.

(64 App. Div. 477.)

DEATH BY SHOCK FROM ELECTRIC LIGHT WIRE CROSSING TELEGRAPH WIRE.

An electric light wire crossed a telegraph wire (which was upon the same poles with a fire department wire) a short block from a pole upon which plaintiff's intestate, a lineman in the employ of the fire department, met his death, while in the performance of his duty, by shock from contact with the telegraph wire. The telegraph wire acquired its deadly current by contact, at the point of crossing, with the electric light wire. There was evidence that the electric light wire was or might have been strung a year before the accident; that it was originally strung but a foot above the telegraph wire; that it would naturally sag a foot in a year; that the smallest usual space required to guard against sagging is three feet. *Held*, that the question of negligence was properly submitted to the jury; also the question, under the circumstances, of contributory negligence of the intestate in failing to wear rubber gloves.

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Cases of this series cited in opinion: *Ennis v. Gray*, vol. 5, p. 325; *Dwyer v. Buffalo Gen. Electl. Co.*, vol. 7, p. 456; *Wittleder v. Citizens' Elec. Illum. Co.*, vol. 7, p. 581; *Clarke v. Nassau Elec. E. Co.*, vol. 6, p. 234; *Leonard v. Brooklyn Heights E. Co.*, vol. 7, p. —; *Piedmont Elec. Ill. Co. v. Patterson's Adm'r*, vol. 2, p. 350; *Junior v. Missouri Elec. L. & Power Co.*, vol. 5, p. 369.

Appeal by defendant from judgment of Supreme Court, Kings County, upon a verdict, and from an order denying defendant's motion for a new trial upon the minutes.

William E. Stewart, for the appellant.

James C. Cropsey, for the respondent.

JENKS, J.: The plaintiff has a verdict for \$6,500 damages for the death of her husband through negligence. The defendant insists that it was not negligent, and that the accident was contributed to by the negligence of the intestate. The intestate was a lineman of the fire department of New York City, who had been sent at noontime of July 13, 1899, to the neighborhood of Vernon avenue bridge, in the borough of Queens, to "clear" a line of telegraph wire from which there was a leakage of the electric current. For this purpose he climbed a telegraph pole, put his leg over the lower crossarm of it, and then his hand came in contact with one of the wires strung on the pole. Thereupon he fell back, was caught on the pole, and was taken down dead from a shock of electricity. The pole in question supported only the wires of the department and of the Western Union Telegraph Company. There were two crossarms; the lower carried the wires last named, and the upper both kinds of wires. The voltages thereof were but 70 and 60 respectively, and were harmless. These wires ran north and south on the west side of Vernon avenue to this pole, passed through separate boxes thereon, and then down a cable along that pole, thence under the waters of Newtown creek, into the borough of Brooklyn. The electric light wires of the defendant were strung from a pole

on the east side of Vernon avenue, opposite Flushing street, westerly across Vernon avenue, and thence along Flushing street. Thus they crossed the department and the Western Union wires at right angles. The voltage of the defendant's wires was in excess of 2,000, and was death-dealing. One of such wires had come in contact with one of the Western Union wires that was suspended on the pole climbed by the intestate, and thereby the latter wire was made deadly also.

I think that the case was properly submitted to the jury by the learned trial justice, DICKEY, J., and that there is no reason which warrants a reversal of this judgment. The liability of the defendant did not depend upon a contract relation or other privity between it and the plaintiff's intestate. *Ennis v. Gray*, 5 Am. Electl. Cas. 325, 87 Hun, 355. It was the duty of the defendant to use due care in the stringing of its electric wires of dangerous voltage across the streets of the city, regardless of the existence of other wires, of the possibility of contact therewith, of the generation of high tension from its wires, and mindful that such other wires from time to time might require the attention of linemen and other workmen in the matters of repair, readjustment, clearance, insulation and restoration to their normal functions. If the defendant failed to string its wires over the wires of the department and of the telegraph company at a height which ordinary care required in order to avoid contact therewith, caused by sagging or by other natural and ordinary causes, then it may be found negligent in the premises. *Ennis v. Gray*, *supra*; *Dwyer v. Buffalo General Electric Co.*, 7 Am. Electl. Cas. 456, 20 App. Div. 124; *Wittleder v. Citizens' El. Illuminating Co.*, 7 Am. Electl. Cas. 581, 47 id. 410; *Clarke v. Nassau Electric R. R. Co.*, 6 Am. Electl. Cas. 234, 9 id. 51.)

It does not clearly appear when this wire was strung; the defendant testifies that it may have been a year before or perhaps not as long. The superintendent testified that when put up it was suspended one foot above the Western Union wire. There is evidence that five or six months before the accident the

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wire hung but eight inches above, and sagged continually thereafter. There is also evidence that some weeks before the accident the distance was but six inches, and evidence, also, that it was from eight to ten inches. The foreman of the defendant said that he had seen the wire for four or five months before the accident, and that the distance was about ten inches. The defendant's superintendent testified that the original distance was one foot. The plaintiff's expert testimony is that the smallest usual space required to guard against the dangers of sagging is three feet, and that sagging was always anticipated. The defendant urges that it was inspected once a week. But mere proof of inspection is not enough. (*Grifhahn v. Kreizer*, 62 App. Div. 413.) The inspector testified that in his opinion any distance was sufficient if the wires did not form contact, and that one foot was practically safe enough, though he further testifies that all wires sagged, and that such a wire would sag twenty-four inches in two years. If the jury found that the wire was suspended for a year, here was testimony that the natural sag would annihilate the original space. The defendant further urges that it was the rule that when sagging was discovered the wire was made taut, but the inspector, while stating that he knew the wire would naturally sag from its weight, from the rain, and for the reason that these particular poles were in made ground, testified that he could not remember whether this wire ever sagged or that he tightened it. The defendant also urges that the wire sagged very suddenly, but reference to the record cited shows that the witness testified: "That wire and all the rest of them sagged. I don't know how much it sagged in two years; it must have sagged about twenty-four inches. I don't know that it was gradual; I didn't think it did, it came very suddenly." At best the credibility of this testimony of the defendant's officers and inspectors was for the consideration of the jury. *Leonard v. Brooklyn H'ts B. R. Co.*, 7 Am. Electl. Cas. —, 57 App. Div. 125.

It is further urged that the accident was due to the severe storm of the night before, which swayed the wires and poles, so

that the defendant's wires came in contact with the Western Union wire, wearing away the insulation by friction, and thereby discharging the foreign current into the Western Union wire. But that does not relieve the defendant if the wires were originally strung improperly, as it is clearly established that sagging is natural to all wires, and that this is due not only to weight, but to rain, to wet and to other natural causes. Though the storm precipitated or hastened the contact, yet such contact might well have been due to the original stringing, which made it possible or probable, sooner or later. Neither wires nor attachments were broken by the storm, which the wire chief of the Western Union Telegraph Company testified did not "occasion trouble" to all the wires; "not seriously; no; a few scattering troubles here and there throughout Long Island."

The defendant contends that the intestate, being an experienced lineman, was aware of the risks of his highly dangerous employment, and was negligent in not wearing gloves of india rubber. It was not shown that such was the ordinary or usual practice under the circumstances; indeed, the only evidence upon the subject is to the contrary. It is true that there is testimony from several witnesses that they would not touch a wire of such voltage with bare hands, but this, obviously, is far from testimony that in the work undertaken by the intestate gloves were ordinarily used. Even if this had been shown, the question of requisite care under the particular circumstances of this case would have been for the jury. *Dwyer v. Buffalo General Electric Co.*, *supra*. The appellant cites *Piedmont Electric Ill. Co. v. Patterson's Adm'x*, 2 Am. Electl. Cas. 350, 84 Va. 747, and *Junior v. Missouri Elec. Lt. & Power Co.*, 5 Am. Electl. Cas. 369. These were actions by servants against masters whose electric wires were of high voltage—facts well known to the plaintiffs. In the case at bar, the only wires attached to the pole were harmless, and gloves were not required in handling them.

It is entirely true, as contended, that the intestate, when he climbed the pole, "assumed the risks of all patent defects which

were obvious, or could, with the exercise of care and prudence have been discovered or ascertained," but the testimony falls far short of admitting the application of the doctrine of obvious risk. The learned counsel for the defendant states that the deceased knew that there was trouble with the wire, that it came from a high tension current, and that he was sent to find where the trouble was and to clear the line. But I fail to find that the record establishes that the intestate knew that the trouble was due to a high tension current, which is the salient fact of this proposition. Erwin, his superior, told him to go out and clear the line and to locate the "ground" of the wire which appeared on the galvanometer. All Erwin knew was that their electricity was leaking. He wished to stop the leak. He says: "I told him his trouble. That it was a ground." It then became the duty of the intestate to "go up the pole, and clear the trouble, . . . or whatever was the source of the trouble." Although Erwin did testify that he knew the trouble was high tension, and that he communicated that fact to the intestate, he almost immediately testified that he did not communicate such fact to the intestate, but that he notified him of the "ground" only; that he himself did not know of the high tension until after the death of the intestate; that no word of high tension was communicated to his office that day. The jury might well have found that the intestate had been directed only to locate the grounding of the wires. It does not appear that at the time of the accident the intestate knew or, in the exercise of due care, should have known that the high tension had been communicated to any of the Western Union wires on the pole in question. And, on the other hand, there was testimony that a heavy current of electricity is not to be looked for when there is merely a "ground," for grounding depletes and does not increase the current, and that if one be looking for a simple leak or ground, it is not customary to make any test before going up on a pole, as such a condition does not involve danger, and a heavy current was not to be anticipated. There was also testimony that a test could not be made without ascending the pole.

The contact between the wire of the defendant and the wire of the pole ascended was at some distance from the pole—about a short block away, says one witness. Whether, in the course of his attempt to reach the fire department box at the top of the pole, the intestate accidentally touched a wire ordinarily safe, but suddenly made fatal by this contact a block away, or whether he intentionally clutched the wire to aid his climb, is impossible to determine. Whether his contact was by accident or by design, I think that the question of contributory negligence in this case was still for the jury. The wires on the pole were ordinarily harmless; the intestate's business required him to ascend to the top of the pole; from the nature of the trouble communicated to him he had no reason to suppose that any of these wires had suddenly become lethal; there were no indications which made such a condition obvious to a man in the exercise of ordinary care and prudence, and under the circumstances it did not appear that he omitted any usual or ordinary precaution before attempting to perform his task, which either involved contact with the wires or made the handling of them natural under the circumstances.

The judgment and order should be affirmed, with costs.

Present—GOODRICH, P. J., WOODWARD, HIRSCHBERG, JENKS and SEWELL, JJ.

Judgment and order unanimously affirmed, with costs.

NOTE.—See not 2 at end of Part III.

MICHAEL GRIFFIN V. JACKSON LIGHT AND POWER COMPANY.

Michigan Supreme Court, Nov. 12, 1901.

INJURY BY ELECTRIC SHOCK—INTERVENING AGENCY.

Plaintiff having been injured by shock from an improperly insulated electric lamp upon the premises of a third party, who knowing the

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defect, continued to use the lamp; *held*, that the intervening agency of the third party saved the electric light company from liability to the plaintiff.

Cases of this series cited and distinguished: *Atlanta Consol. St. Ry. Co. v. Owings*, vol. 6, p. 271; *Ahern v. Oregon Teleph. Co.*, vol 4, p. 349.

Appeal by defendant from judgment of Circuit Court, Jackson County.

Wilson & Cobb, for appellant.

Charles A. Blair and Richard Price, for appellee.

MONTGOMERY, C. J.: The plaintiff brings this action to recover for a negligent injury. The facts, as they appear by the testimony, are that the plaintiff was in the employ of the Schlitz Brewing Company, engaged in delivering beer to its customers. One Wright Calkins was a customer of the brewing company. On his premises, and in the cellarway through which plaintiff passed in delivering the beer, was an electric light, attached to a movable wire, supplied with a brass or metal handle or hanger, by which it was hung upon a nail in the cellarway. The wire connecting therewith passed through a hole in the lower end of the handle; thence to the carbon film in the bulb. It was claimed that it was necessary in using the light, and customary, to take hold of the handle of the hanger. The breach of duty alleged is that the defendant failed to insulate the wire and handle to the fixture properly. It appears by the testimony of Calkins that the handle had formerly had a kind of cement wrapper on, but, in carrying it through the cellar, it would get loose and drop off, and that it was off at the time of the accident; that some two or three weeks before the accident an agent of the defendant put in a new wire, but did not put any cement or wrapping on at that time; that the agent of the defendant was notified that the wrapper to the handle was off, and that he (Calkins) wanted a new one put on, and that the agent promised to fix it, but that it never was fixed prior to the accident. Plaintiff recovered a judgment for injuries sustained, and the defendant brings error.

The principal contention of defendant is that upon this state of facts it does not appear that there was any such privity between the plaintiff and the defendant as entitles the plaintiff to recover for the defendant's neglect, that whatever duty the defendant owed it owed to Calkins, and that third parties injured by reason of this neglect of duty are not entitled to recover against the defendant. There was evidence tending to show that the defendant was owner of this fixture, but this does not determine the question of liability. In the leading case of *Winterbottom v. Wright*, 10 Mees. & W. 109, the defendant was the owner of the mail coach supplied, and it was also his duty to keep it in repair; and it may be stated as a general rule that one who lets property for use, like one who sells it, is not responsible to third parties injured by reason of a defect in the article or property let or sold. See *Necker v. Harvey*, 49 Mich. 517, 14 N. W. 503; *Fowles v. Briggs*, 116 Mich., at page 428, 74 N. W. 1046, 40 L. R. A. 530, 72 Am. St. Rep. 539, 540, and cases cited.

In *Fowles v. Briggs* it was said that the only apparent exceptions to this rule were where the fault consisted of defendant failing to keep his premises in a suitable and safe condition, or where the defendant had reserved the right to direct the manner of the work or undertaken to supply the instrumentalities, or where the shipper of a dangerous substance, the character of which is not made known to the carrier, has been held liable. If it be suggested that this case comes within the latter class of cases, namely, where the defendant is dealing with a dangerous substance, the limitation of the rule, as we understand it, is that there shall be no intervening human agency which might have arrested the injury or furnished protection. This is well illustrated in the case of *Carter v. Towne*, 103 Mass. 507, where gunpowder was sold to a boy 8 years of age, and it was, of course, conceded that the defendant was responsible for the injury likely to occur from the explosion of this dangerous substance.

But it appeared that, after the sale, the boy had carried home the gunpowder, and put it in the custody of his parents, and that a part of it had been fired off by him, with their permission, before the explosion occurred by which he was injured. It was held that the sale of the gunpowder to the boy was not, therefore, a direct, proximate, or efficient cause of the injury.

So, in the present case, it appears that Calkins knew of the necessity of a protection for the lamp, and, whatever may be said of the failure of duty on the part of defendant to him, he saw fit to make use of it in its imperfect condition, and this must be held to be the intervention of another agency between the defendant's neglect and the plaintiff's injury. The cases cited by plaintiff's counsel none of them militate against the rule which we think must govern the present case. See *Reagan v. Light Co.* (Mass.), 45 N. E. 743; *Consol. St. Railway Co. v. Owings* (Ga.), 6 Am. Electl. Cas. 271, 25 S. E. 377, 33 L. R. A. 798; and *Ahern v. Oregon Teleph. Co.* (Or.), 4 Am. Electl. Cas. 349, 33 Pac. 403, 22 L. R. A. 635. In each of these cases the fault was a fault of the defendant's system, wholly under its own control, and with which no person other than the defendant had authority to interfere in any manner whatever. But such is not the present case.

Whether we may deem electricity, in the voltage used by the defendant, a dangerous substance, within the meaning of the rule that one transmitting such dangerous substance shall be held liable, where there is no intervening person charged with any duty connected with it, who has knowledge of its dangerous character, in a case presenting facts involving that principle, we need not here decide, as we think that, upon the ground stated, the verdict should have been directed for the defendant.

The judgment will be reversed, and a new trial ordered. The other justices concurred.

BOYD V. PORTLAND ELECTRIC COMPANY.

Oregon Supreme Court, Nov. 12, 1901.

INJURY BY SHOCK—RES IPSA LOQUITUR.

Proof that a live wire was down in a street and injury resulted therefrom to a traveler coming in contact with it, is *prima facie* proof of negligence.

A person thus injured does not lose the benefit of this rule by alleging in the pleading that the wire was weak and defective and insufficiently stretched and fastened; so as to assume the burden of establishing those specific facts; since the presumption is that it would not have fallen unless defective or improperly placed.

Questions of negligence and contributory negligence held to have been properly submitted to the jury, including the question (for error in failing to submit which to the jury the judgment obtained upon the former trial was reversed) of defendant's diligence in ascertaining or providing means for ascertaining, that a wire was broken during a heavy storm.

Cases of this series cited in opinion: *Haynes v. Raleigh Gas Co.*, vol 5, p. 264; *Denver Consol. Elec. Co. v. Simpson*, vol. 5, p. 278; *Trenton Pass. Ry. Co. v. Cooper and Bennett*, vol. 7, p. 444; *Snyder v. Wheeling Elec. Co.*, vol. 7, p. 473; *O'Flaherty v. Nassau Elec. Ry. Co.*, vol. 7, p. 535; *Uggle v. West End St. Ry. Co.*, vol. 4, p. 389; *Mitchell v. Charleston L. & P. Co.*, vol. 6, p. 245.

Appeal by defendant from judgment of Circuit Court, Multnomah County.

This is an action by R. B. Boyd against the Portland General Electric Company to recover damages alleged to have been suffered by him on account of an injury to his minor son from coming in contact with a live electric light wire. The defendant is a corporation engaged in supplying the city of Portland and its inhabitants with electric light, for which purpose it has put up poles along the streets, having cross arms near the top, upon which its wires are stretched. The day before the accident, and while a storm was prevailing, two of the wires on Magnolia street became crossed at a point some 125 feet west of

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Dakota street, and about 6 or 7 o'clock in the evening the smaller one burned in two and hung down in two loops east of the break; one of them nearly reaching the ground two or three feet west of the pole at the intersection of the streets, where it swung directly over a path used by residents of the neighborhood. The other end remained suspended from the next pole, some 150 feet west, and did not reach the ground. About the time, or soon after, the wire parted, the boy who was subsequently injured, a lad about 11 years of age, and an elder brother, passed the pole west of Dakota street, noticed the broken wire at that place, and knew it was dangerous, but did not know anything about the other wire hanging down east of that point at the intersection of the streets. About 8 o'clock the next morning, the plaintiff, who resides on Dakota street, some 200 feet south of its junction with Magnolia, sent his son on an errand which required him to travel along the path near the light pole at the corner of the street, over which the wire was suspended. A few minutes later the boy was discovered lying on the ground, immediately under the broken wire, in an insensible condition, his right hand badly burned, while he was otherwise seriously, and perhaps permanently injured. No one witnessed the accident, and the lad was unable to give any account of how it occurred, but says he passed out of the front gate, and ran north along Dakota street without looking up, after which he had no recollection of what occurred. It is admitted, however, that his injury was caused by contact with the broken wire. The negligence charged in the complaint is that the wire which parted and caused the injury was weak and defective, and not sufficiently attached or fastened to the pole, or properly stretched, or safely insulated, owing to which defects and weakness it broke and parted; that defendant could have known by the proper diligence, and did know, at the time, or very soon after, the wire parted, and long before the injury occurred, that the wire was broken and swinging over and across the street, to the imminent danger of persons travel-

ing thereon; that, disregarding its duty, it failed and neglected to remove or repair the broken wire, or to give any warning of danger, but wrongfully and negligently permitted it to remain in such condition until after the injuries complained of were received. The answer denies the negligence charged, and, for an affirmative defense, after alleging the contributory negligence of the plaintiff's son, avers that the wire which parted was of the best known standard manufacture, and was placed upon the poles in a proper way; that a heavy storm prevailed during the afternoon of the 6th of December, the wind at one time reaching a velocity of 60 miles an hour, which the defendant believes forced the wire across a larger one on the cross arm to the north of it, so that the friction of the wires caused the insulation to wear away, permitting them to come in contact; that between 6 and 7 o'clock in the evening the smaller one burned through and parted, and fell in loops across the other, as stated in the complaint; that, although defendant had the best known appliances in use at the time for detecting or discovering the grounding of its wires, it had no knowledge of such parting until notified of the accident to plaintiff's son, when, upon examination, it ascertained that neither end of the broken wire had come in contact with the ground, so as to form a short circuit, and therefore the fact of the wire having parted could not be indicated by its appliances. The reply put in issue the new matter alleged in the answer; and, the trial resulting in a verdict and judgment in favor of the plaintiff, the defendant appeals.

R. Mallory, for appellant.

E. B. Dufur, for respondent.

BEAN, C. J. (after stating the facts): The plaintiff gave evidence tending to show when the wire which caused the injury to his son fell and the circumstances surrounding the accident, but gave no direct evidence of the specific acts of negligence charged in the complaint. The court, however, instructed the

jury, among other things, that "in cases of this kind the law raises a presumption of negligence from the mere fact that the wire broke and the accident happened, because of the high degree of care which is required on the part of the person or corporation conducting such business, and for reasons which I need not discuss here. What I mean by that is that if any evidence had been brought here that this wire was broken, and through the breaking of the wire this boy had been injured, and then nothing further had been introduced in the case—no further evidence—and the case was left there, it would be your duty to find for the plaintiff, provided you found, also, that he was not guilty of negligence on his part. That is what is called a *prima facie* case. Now, this may be rebutted by evidence on the part of the defendant, notwithstanding this presumption. If the defendant comes in and satisfies you that it did use ordinary care in building and maintaining and repairing this line, and that the accident occurred without fault on its part, then it would be your duty to find on that point for the defendant." The giving of this instruction is assigned as error. The general rule of law is unquestioned that, excepting in cases where the defendant is an insurer, a party who charges another with negligence must prove it. But there are instances in which proof of an accident and the manner of its occurrence is sufficient to make a *prima facie* case, and to cast the burden on the defendant to show that it occurred without fault on his part. As a general rule, where the thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of events would not happen if he had used proper care, it affords reasonable evidence, in the absence of a satisfactory explanation, that the accident arose from a want of care. *Esberg Cigar Co. v. City of Portland*, 34 Or. 282, 55 Pac. 961, 43 L. R. A. 435, 75 Am. St. Rep. 651. This doctrine is held applicable in actions for injuries received from contact with a live electric wire in a public street. Electricity is a dangerous element, and those who make merchandise of it are legally

bound to exercise that degree of care that will render its use reasonably safe; and, as the wires which convey it cannot safely be permitted within reach of travelers, a presumption arises, when they are found out of their proper place, that those having them in charge have been negligent. The courts quite universally hold that proof that a live wire was down in a street and injury resulted therefrom is *prima facie* evidence of negligence. 2 Jag. Torts, 864; Joyce, Electric Law, sec. 606; Keasbey, Electric Wires (2nd Ed.), sec. 271; *Western Union Tel. Co. v. State*, 82 Md. 293, 33 Atl. 763, 31 L. R. A. 572, 51 Am. St. Rep. 464; *Haynes v. Raleigh Gas Co.*, 5 Am. Electl. Cas. 264, 114 N. C. 203, 19 S. E. 344, 26 L. R. A. 810, 41 Am. St. Rep. 786; *Denver Consolidated Electric Co. v. Simpson* (Colo. Sup.), 5 Am. Electl. Cas. 278, 41 Pac. 499, 31 L. R. A. 566; *Trenton Pass. Railway Co. v. Cooper* (N. J. Err. & App.), 7 Am. Electl. Cas. 444, 37 Atl. 730, 38 L. R. A. 637, 64 Am. St. Rep. 592; *Snyder v. Wheeling Electrical Co.* (W. Va.), 7 Am. Electl. Cas. 473, 28 S. E. 733, 39 L. R. A. 499, 64 Am. St. Rep. 922.

The defendant contends, however, that as the complaint in hand avers that the wire which caused the injury was weak and defective, and insufficiently stretched and fastened, the plaintiff was obliged to point out by his testimony some defects in the particulars alleged. But we are unable to concur in this view. The doctrine of "*res ipsa loquitur*" alluded to is a mere rule of evidence. 2 Thomp. Neg. 1227 *et seq.* It proceeds on the theory, as the term implies, that the happening of an accident under certain circumstances is of itself *prima facie* evidence of negligence, and, when it is evidence of the particular negligence charged in the complaint, the plaintiff is entitled to invoke the rule. Thus, in *Railroad Co. v. Cooper*, *supra*, the negligence averred was the insufficient bonding or fastening of the rails of a street railway, and it was insisted that the plaintiffs were obliged to point out and establish some particular defect or insufficiency as alleged. The court held, however, that the escaping of electricity from the rails was presumptive proof of the

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negligence alleged, thus bringing the case within the doctrine of "*res ipsa loquitur*." In *Snyder v. Electrical Co.*, *supra*, the negligence charged was insufficient fastening, and, although the court held that no evidence of other acts of negligence was competent, it ruled that the mere fact that the wire fell created a *prima facie* presumption of negligence, sufficient to support the action unless rebutted by something appearing in the case. In *Electric Co. v. Simpson*, *supra*, the negligence charged was defendant's failure to properly construct its line and its omission to take the necessary precautions to prevent the wires from falling. It was held that the fact that the wire had become detached from its fastenings and hung down in a public alley, so as to endanger public travel, was *prima facie* evidence of negligence on the part of the defendant, and an instruction to that effect was properly given. In the case at bar, it probably would have been sufficient, if the plaintiff had specified in the complaint generally the act or omission which he alleges to have been the proximate cause of the injury, and averred that it was negligently done or omitted. But since the wire which caused the injury would not, presumably, have parted and fallen down, in the ordinary course of events, unless it was either defective or improperly stretched or fastened, it is reasonable to presume that its position in the street was owing to one or all of these causes. It must be assumed that a suitable wire, properly put up, would not be a menace to travelers on the highway; otherwise, the operation of a light plant by wires supported by poles in the streets of a city would be *ipso facto* a nuisance, and an unauthorized interference with the rights of the public. If, therefore, the wires break and fall down, that fact in itself affords reasonable evidence of negligence, either in the use of defective wires or in the manner of putting them up, and calls upon the defendant to show that it was without fault. It is, of course, true that in an action of this character the plaintiff cannot allege negligence in one particular, and upon the trial prove and recover upon another. *Lieuallen v. Mosgrove*, 33 Or. 282,

286, 54 Pac. 200, 664; *Jones v. City of Portland*, 35 Or. 512, 58 Pac. 657. But we do not understand that the instruction complained of conflicts with this rule. It was confined to the inference or presumption to be drawn from the breaking of the wire and the happening of the accident, the proof of which was *prima facie* evidence that the wire was either weak and defective or improperly put up. The instruction, therefore, did not advise the jury that the plaintiff was entitled to recover on a ground of negligence not charged. The cases already cited illustrate the application of the doctrine of "*res ipsa loquitur*" where specific acts of negligence are charged in the complaint.

It is argued, however, that, if proof of the accident was sufficient under the pleadings to make out a *prima facie* case in favor of the plaintiff, it was overcome by the testimony of the defendant. But the weight, value and credibility of such testimony were for the jury, and the court could not properly have taken the case from them on the ground that the defendant had shown by its employees that the accident occurred without fault on its part. In a recent case in New York, where a trolley wire fell, injuring a traveler, it was held that the presumption of negligence on the part of the company, arising from the fall of the wire and the happening of the accident, was not overcome by the evidence of interested persons that the supports were the best obtainable, that the line was frequently inspected, and an automatic device called the "breaker system" was in use, which, if properly adjusted, would automatically cut off the current if the wire touched the ground; the credibility of the witnesses and the sufficiency of the device being questions for the jury. *O'Flaherty v. Nassau Electric Railway Co.*, 7 Am. Electl. Cas. 535, 34 App. Div. 74, 54 N. Y. Supp. 96. In *Ugla v. West End Street Railway Co.*, 4 Am. Electl. Cas. 389, 160 Mass. 351, 35 N. E. 1126, 39 Am. St. Rep. 481, the plaintiff was struck by part of an iron ear used to clasp a trolley wire and keep it in place around the curve over the defendant's track. There was no evidence of the defendant's negligence, except that

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the iron ear broke with the strain and one part of it fell, striking the plaintiff on the head. The verdict in his favor, however, was sustained, notwithstanding the defendant had introduced evidence tending to show that the break was a clean one, bright in color and appearance; that the iron was sound all through, with no flaw or defect in it; that the whole apparatus was manufactured and put up by a manufacturer of the highest reputation; that the ear and guy constituted the best and strongest device known at the time for keeping trolley wires in place; that the defendant company employed a competent corps of assistants, including foreman and superintendent, who inspected the whole line weekly, including the cars and every attachment; and that this particular part of the line had been inspected within a week prior to the accident.

It is next insisted that the court erred in instructing the jury that, "if the defendant had known of the breaking of the wire. it would have been its duty, under the high degree of care required of it under the circumstances, to have repaired it at the earliest possible moment, or at least as early as it could practically be done; but, if it did not know of the break—and the evidence here, I believe, is undisputed that it did not—the question for you to determine is whether, under the circumstances, it reasonably should have known, or should have provided means by which it would have known, of the breaking within that time, and within such a time that it could reasonably have repaired the break before this accident occurred. It is for you to determine whether or not it was guilty of a want of that high degree of care required of it in not providing means to find out whether this line had broken within this time. If you should find that the company was negligent in this respect, then it would be responsible for the negligence, although it might not have been guilty of negligence in any other respect." The specific objection to this instruction is that there are no allegations in the complaint charging the defendant with negligence in failing to adopt necessary or proper means to ascertain whether the wire

was broken; but, on the contrary, it is argued, the complaint alleges that defendant did know of the break very soon after it occurred, and did not exercise due care and diligence in replacing and taking care of it. The language of the complaint is that defendant, its officers, agents and employes, by proper diligence could have known, and did know, very soon after the wire was broken, and long before the injuries complained of, that it was broken and hanging over the street, etc., and carelessly failed and neglected to remove or repair it, or to give any warning of danger, and wrongfully and negligently permitted the broken wire to remain in such dangerous condition until after the accident. It is not clear whether the pleader intended to charge negligence in not ascertaining that the wire had broken, or negligence in not taking care of a broken wire; but the construction which seems to have been put upon the pleadings by the defendant in its answer, and by the court and parties throughout the trial, is that it charged negligence in not exercising reasonable care and diligence in ascertaining that the wire was broken, and we are of the opinion that the court did not err in submitting that phase of the question to the jury. Again, it is objected that this instruction assumes there was no evidence that the defendant had provided means, or used reasonable care and caution in providing means, for acquiring speedy information of a break in the wires. We do not consider this a reasonable interpretation of the language used by the court. It manifestly intended to, and did, submit to the jury, as a question of fact, whether the means which defendant had of ascertaining when a wire parted were such as proper care and diligence would require.

It is next asserted that the court erred in instructing the jury that "the defendant would not be liable for an act beyond its control and which could not reasonably be foreseen. It would not be liable for an accident caused by some unusual act of nature, or what is called an 'act of God,' if this could not have been reasonably foreseen and expected. As, for instance, sup-

pose a stroke of lightning had occurred there, and broken one of these wires and thrown it down, and through that, and before the defendant had reasonable time in which to repair the break, the accident had occurred; that would have been something that could not reasonably have been foreseen, and for which the defendant could not be held liable. So, too, if this breaking, you should find, was caused by such an unusual storm, unprecedented storm, or any act of God that could not be expected, such unusual storm as could not reasonably have been foreseen, something that had not been known to happen before in that way, then the defendant could not be held liable. But an ordinary storm, such as we have every winter, or nearly every winter, and which on that account ought to be expected to occur in any winter, would not excuse the defendant; that is, the mere fact that the injury was occasioned by the storm. The breaking of the wire, however, might occur during the storm, or at any other time, and not be the fault of the defendant. I simply, in giving you that instruction, refer to the storm alone." It is argued that this instruction is erroneous because it tells the jury, in effect, that if a storm caused the wire to part, and it was such a storm as happens in this country every winter, or nearly every winter, it would not be a defense, although it may have been in fact an extraordinary or unusual storm. The rule is that if the poles and wires of an electric company are properly erected and maintained, and a storm of unusual and extraordinary severity, such as could not reasonably have been expected, causes a wire to fall, and it is not negligently permitted to remain an unreasonable time in such condition, the company will not be liable for an injury caused thereby; in other words, where the proximate cause of the injury is an external force, for which the company is not responsible, the question of liability will depend on whether the force was one that might reasonably have been anticipated. And this, it seems to us, is the rule laid down in the instruction complained of. It is true, certain statements made by the court in attempting to explain and elucidate the matter

to the jury would, if taken from their context, seem to support the contention of counsel; but, when construed in its entirety, the instruction amounts to a statement that defendant would not be liable for the breaking of a wire caused by a storm of unusual and extraordinary severity, which could not reasonably have been anticipated, and this is the law upon the subject. Joyce, *Electric Law*, sec. 450; Keasbey, *Electric Wires* (2nd Ed.), sec. 236; *Mitchell v. Charleston Light and Power Co.* (S. C.), 6 Am. Electl. Cas. 245, 22 S. E. 767, 31 L. R. A. 577.

After the case had been argued, counsel for the defendant requested the court to submit to the jury two special findings, the nature and character of which are not shown by the record. The request was denied, but during its consideration a colloquy between the court and counsel for the defendant ensued, a part of which is contained in the record, in the course of which the court stated, in effect, that the plaintiff's son was only required to exercise ordinary care, and was not obliged to keep his eyes on the full width of the street, and look at every point for an electric light wire, but had a right to assume that the street was free from such an obstruction, and to have his head down while traveling therein, unless he had reason to believe the wire was there. It is urged that this was error, because it indicated the opinion of the court upon the defense of contributory negligence pleaded in the answer. The question of contributory negligence was, of course, for the jury, and it was submitted to them under proper instruction. The statements of the court in reference to the propriety of submitting the special findings, although made in the presence of the jury, were not intended for their guidance, or as an announcement of the rule of law by which the question of contributory negligence should be determined, but were the reasons given for the court's denial of counsel's request, and, in view of the subsequent instructions, did not, in our opinion, prejudice the defendant's case with the jury.

Objection is also made to the refusal of the court to give certain instructions requested by the defendant on the subject of

Light & Power Co. v. Maxwell.

contributory negligence; but that phase of the question was fully covered by the general charge, and there was no error in such refusal.

Having thus disposed of the questions presented on this appeal, and finding no error in the record, the judgment is affirmed.

NOTE.—See opinion on previous appeal of this case, *ante*, p. 530.

INTERNATIONAL LIGHT AND POWER CO. v. LOUIS MAXWELL
AND WIFE.

Texas Court of Civil Appeals, Nov. 13, 1901.

DEATH BY SHOCK FROM ELECTRIC LIGHT WIRE—RES IPSA LOQUITUR.

Proof of the fact that a wire heavily charged with electricity was placed so near another wire which ran down near a sidewalk where people were constantly passing, as to fill it with electricity, charges the party who erected the wire with the knowledge that persons were liable to be injured or killed by coming in contact with such wire.

Appeal by defendant from judgment of District Court, El Paso County.

Clark, Fall, Hawkins & Franklin, for appellant.

Patterson & Wallace, for appellees Maxwell.

FLY, J.: Louis Maxwell and his wife, Harriet Maxwell, instituted this suit to recover of appellant, the El Paso Gas, Electric Light & Power Company, and Wehner & White damages arising from the death of their son, James H. Maxwell, which it was alleged was caused through the negligence of the defendants. Appellant pleaded contributory negligence on the

part of the deceased, in placing his hand on a spool or reel attached to a post near the sidewalk; that at the time of the death of said James H. Maxwell the plant of appellant was in process of construction by the El Paso Mine, Mill & Smelter Supply House, or one of its sub-contractors, who, as to appellant, was an independent contractor, and said plant had not at that time been turned over to appellant, but was under the exclusive control of said independent contractor. Appellant further answered that, if the death of James H. Maxwell was caused by the negligence of any one other than himself, it was through the negligence of its co-defendants, in improperly placing the post and suspending a cable from which their arc lamp was suspended; and, in the event of judgment against it, it prayed for judgment over against its co-defendants. The other defendants pleaded contributory negligence on the part of deceased, and further that, if he lost his life through the negligence of any one other than himself, it was through the negligence of the International Light & Power Company. The court instructed the jury to return a verdict for the El Paso Electric Light & Power Company and Wehner & White, and the jury returned a verdict responsive to such direction, and against appellant, for the sum of \$2,500.

The facts tended to establish that deceased was killed by electricity transmitted by a cable, to which an arc lamp was suspended, to the reel or spool on the side of a post, or to the post itself, which was wet from a recent rain. The electricity was communicated to the cable by a wire belonging to appellant, which had been in such proximity to the cable as to charge it with electricity. The cable was suspended across the street when the wire belonging to appellant was placed in proximity to it.

[The questions principally considered were as to whether the responsibility for the accident rested with the defendant or with an independent contractor; and as to the measure of damages. The judgment was reversed upon the ground of error in the

latter particular. So much of the opinion as relates to these subjects is omitted.]

The court charged the jury "that it is the duty of persons, in the erection, maintenance and operation of electric light primary wires upon the streets of a city for the transmission of electric currents, to use ordinary care so to place and maintain the same in reference to other objects conducting electricity as to avoid the escape of electricity from their wires to such conductors in such quantities as might injure persons passing along such streets or sidewalks, who, while standing on such streets or sidewalks, may come in contact with conductors." The charge is objected to in the assignment of error as imposing a higher degree of care than is required by law, because it eliminates the question as to whether appellant might have reasonably anticipated the results of the construction of its plant in the way in which it was constructed. Proof of the fact that a wire heavily charged with electricity was placed so near another wire which ran down near the sidewalk where people were constantly passing as to fill it with electricity charged the party who erected the wire with the knowledge that persons were liable to be injured or killed by coming in contact with such wire. Dealing with so dangerous an agency as electricity, it was clearly the duty of appellant to construct its wires so as to prevent them conducting the electricity in such proximity to a sidewalk that people might be brought in contact with it; and if it is done, and some one is killed, it is chargeable with the knowledge that such result was likely to follow. The court did not assume that the placing of the wires in the position they occupied was negligence, but that matter was left to the jury to find.

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The judgment is reversed, and the cause remanded.

NOTE.—See Mr. Keasbey's note, *ante*, p. 446; also note 2 at end of Part III.

HENRY POULSEN, Appellant, v. NASSAU ELECTRIC RAILROAD
COMPANY, Respondent.

New York Supreme Court, Appellate Division, Second Department, June,
1897.

(18 App. Div. 221.)

ELECTRIC RAILWAY—INJURY TO PASSENGER.

A trolley car traveling upon the track in a blaze of fire presents an extraordinary condition, and in an action brought by a passenger on account of injuries sustained as a result thereof, the railway company is called upon to explain the cause of the fire.

Gilmore v. Brooklyn Heights R. Co., 6 Am. Electl. Cas. 432, followed.

Appeal by plaintiff from judgment of Kings County Court, dismissing complaint.

Facts stated more fully in opinion in case next following; the child for loss of whose services this action was brought being the niece who accompanied the plaintiff in the next case.

William L. Carey, for the appellant.

James C. Church, for the respondent.

HATCH, J.: We are of the opinion that the case made by the plaintiff was sufficient to call upon the defendant for an explanation of the cause of the fire. The obligation resting upon the defendant was to exercise the utmost care and diligence suggested by human prudence and foresight to insure the safety of the passengers it had received for carriage. *Palmer v. D. & H. C. Co.*, 120 N. Y. 170. If we assume that the cause of the fire was the burning out of the electric fuse connected with the motor, and that it was placed upon the car as an appliance for its safe operation, the case would not be changed. The effect of this assumption does not carry the case beyond the fact that in ordinary

operation the fuse blows out with an "attendant flash," to use the expression of the defendant's counsel. It was not claimed upon the argument that the blowing out of a fuse, in the usual course, was attended with any other display than a flash of light, and we may take notice that the operation of street cars by electricity is not attended by the appearance of a car on fire, or that it travels upon the track in a blaze of fire. When this phenomenon is present it indicates an extraordinary condition and the presence of causes which are not usually co-existent in the ordinary operation of the car. Under such circumstances, the doctrine approved by us in *Gilmore v. Brooklyn Heights R. R. Co.*, 6 Am. Electl. Cas. 432, 6 App. Div. 117, has precise application.

The child who was injured testified that she saw a blaze of fire coming from the box alongside of the motorman, and becoming frightened jumped from the car. Another witness stated that she saw the car fifty or sixty feet away, coming down the street in a blaze of fire; that she also saw a flame of fire dashing through the car where the child was sitting. Another witness was called to the door of his house by a cry that the car was on fire, and saw the car was all aflame. This testimony establishes the fact that the appearance of the car, with the attendant fire, was extraordinary in character, and entirely different from the mere blowing out of a fuse with its attendant flash. The condition was so far extraordinary and unusual as to call upon the defendant for explanation. If the mere fact that a fuse blew out conclusively exempted the defendant from liability, it would lead us to the conclusion that it would be so exempted even though car and passengers be entirely consumed. We are of opinion that a case was made which authorized the jury to infer negligence and which called upon the defendant to explain. The court, therefore, erred in dismissing the complaint.

The judgment should be reversed and a new trial granted, with costs to abide the event.

All concurred.

Poulsen v. Electric Railroad Co.

Judgment and order reversed and a new trial granted, costs to abide the event.

NOTE.—See note 2 at end of Part III.

OLGA POULSEN, Respondent, v. NASSAU ELECTRIC RAILROAD COMPANY, Appellant.

New York Supreme Court, Appellate Division, Second Department, May, 1898.

(30 App. Div. 246.)

ELECTRIC RAILWAY—INJURY TO PASSENGERS.

While plaintiff and her niece were riding in defendant's trolley car, a flashing or flaming was seen to issue from the controller, which condition was allowed to continue while the car ran one hundred feet, and until the fuse burned out with another flash, when the plaintiff and her niece jumped in fright from the car and were injured.

There was evidence tending to show that the flash that issued from the controller box was startling and unusual, and that flashing and flaming are indications of danger; that there had been no inspection of the car before the accident, on the same day; that the controller was out of order, a fact easily discoverable, and in fact discovered after the accident.

Held, that under these circumstances the company was not excused by proof that the controller and fuse were standard and usual, and that the question of defendant's negligence was properly submitted to the jury.

Appeal by defendant from judgment of Supreme Court, Kings County, upon a verdict of \$7,500 and from order denying motion for new trial made upon the minutes.

Stephen C. Baldwin, for the appellant.

Charles J. Patterson, for the respondent.

Poulsen v. Electric Railroad Co.

GOODRICH, P. J.: The plaintiff, a woman thirty-two years of age, on the evening of August 12, 1896, was a passenger in an open trolley car of the defendant. The car was operated by a controller or motor box, situated at the front railing of the car. This controller is an upright box, having on the top a brake or handle which revolves a cylinder on the inside of the box. Around the cylinder are long strips of metal, called fingers, which, as the cylinder revolves, come in contact with corresponding metallic fingers on an inclosing cylinder, thus making a circuit for the current. As the handle moves to close or open the circuit, sparks or flashes are constantly emitted. Outside the interior works is a covering, the inside of which is lined with asbestos, upon which are impressed, and easily seen, black marks occasioned by the sparks or flashes. These marks are more or less extensive, proportionately to the volume of the flashes. The breaking of the current burns any dust or grease which may have accumulated on the fingers, and sometimes melts the metal so as to create little knobs, and this increases the volume of the flashes. At the top of the inclosing cover is an opening through which another brake or handle protrudes, which is used to turn the current on or off; and it is through this opening that the flashes are emitted so as to be visible to bystanders.

Underneath the flooring at the forward end of the car is a fuse consisting of a copper wire intended for a safety appliance and of such size and density that a dangerous or unnecessarily strong current will melt it and thus break the current.

At the time of the accident the car was going westerly along Park avenue, Brooklyn, between Clermont avenue and Adelphi street, when a flashing or flaming shot out of the controller box at the front of the car. The motorman immediately turned off the overhead switch and stopped the current of electricity by which the car was operated, thus preventing the flashing, after which the current was turned on again and the car proceeded on its course for a distance of 100 feet, during which time the flashing continued. The electric fuse above described then

burned out with another flash, whereupon the plaintiff and her niece, Martha, a child twelve years of age, alarmed by the flashing, jumped from the car while it was still in motion, and the plaintiff falling to the ground broke her thigh bone and received other injuries. The jury found a verdict in her favor of \$7,500, and from the judgment entered thereon the defendant appeals.

This same accident was under consideration by this court in *Poulsen v. Nassau Electric R. R. Co.*, 18 App. Div. 221, which was an action brought by the father of Martha to recover damages for the loss of the child's services. The County Court dismissed the complaint upon the merits, and the plaintiff appealed to the Appellate Division. This court, Mr. Justice HATCH writing the opinion, held that the case made by the plaintiff was sufficient to call upon the defendant for an explanation of the cause of the fire. The court said (p. 222): "It was not claimed upon the argument that the blowing out of a fuse, in the usual course, was attended with any other display than a flash of light, and we may take notice that the operation of street cars by electricity is not attended by the appearance of a car on fire, or that it travels upon the track in a blaze of fire. When this phenomenon is present it indicates an extraordinary condition and the presence of causes which are not usually co-existent in the ordinary operation of the car. Under such circumstances, the doctrine approved by us in *Gilmore v. Brooklyn Heights R. R. Co.*, 6 Am. Electl. Cas. 432, 6 App. Div. 117, has precise application."

In the *Gilmore* case, in which Mr. Justice BARTLETT wrote the opinion, the accident occurred from a sudden movement of the brake on the front platform, which being turned on tight was set free in some unexplained manner and struck the plaintiff as she was entering the car. The court said (p. 119):

"In the prudent operation of a street railroad, such an occurrence, endangering the safety of those who accept the invitation which is held out to them to become passengers, is unusual to say the least; and the circumstances bring the case within the rule

that where the thing which causes an accident is controlled or managed by the defendant, 'and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care.' " (Citing cases.)

Following these decisions the defendant undertook, in the case at bar, to establish as a defense that the controller was a standard appliance in use and properly so throughout the United States; that no system of inspection can prevent flashes escaping from the box containing the controller; that even new controllers of this standard type will produce these flashes, and that in the ordinary use and management of such controllers particles of dust or grease collected therein will cause such flashes.

There was evidence clearly tending to show that the flash which issued from the controller box was of a startling and unusual character, continuing while the car was going a distance of about 100 feet, and that it was followed by another flash caused by the burning out of the safety fuse under the forward part of the car.

Some of the witnesses describe the flashing or flaming from the controller as being from two to six feet in height and enveloping the motorman so that the whole front of the car seemed to be on fire. It was not surprising that such an exhibition should startle the plaintiff and that, to save herself from danger, she jumped from the car, and the fact that other passengers remained does not conclusively establish contributory negligence on her part in jumping. It is a significant fact that the motorman was not called as a witness, and that no explanation of his absence was offered, a fact which the jury were entitled to consider in judging of the cause and character of the flashing or flaming which alarmed the plaintiff. The question, therefore, is whether the defendant discharged its duty to its passengers.

McCaig v. Erie Railway Co., 8 Hun, 509, was an action to recover damages caused by sparks issuing from a locomotive. A

judgment was rendered for the plaintiff, which was reversed by the General Term, the court saying (p. 601): "The evidence was not sufficient to warrant a verdict for the plaintiff without further proof showing that such emission of sparks was *unusual* in degree or character, or the sparks were of an extraordinary size and such as would not be emitted from perfectly constructed locomotives." This case has special bearing upon the case at bar, by reason of the emphasis which the court placed upon the word *unusual*, and it cannot be doubted, from the testimony in this case, that the appearance of the flashing or flaming was of a very unusual character indeed.

Under the decisions above cited, the defendant was called upon to prove that the accident occurred without fault on its part. We think that the alleged explanation offered by the defendant did not explain. Assuming that the controller and the fuse were standard in character and the usual appliances, and that the fuse was intended to prevent an undue and dangerous amount of electricity from passing into the controller, the evidence of the expert witnesses called by both parties establishes that the controller is likely to become out of order by the presence of dust or grease on the fingers, so that it will emit sparks of unusual size; that there are three classes of light in successive gradations, which are described as, *first*, sparks; *second*, flashing, and, *third*, flaming; and that sparks are not dangerous, but that flashing, and especially flaming, indicate danger. It was not shown that there was any inspection of the car in question at any time during the day before the hour of the accident. There is evidence showing that the car was not allowed to continue its trip, but was taken back to the shop after the accident, and that the defendant's examiner found that "the controller was a little dirty . . . just a little dusty, a little dirty," although he adds that there was nothing unusual the matter, and that he only found it necessary to replace the fuse, and that the car was used the next day, without any repairs; but all of these matters were for the consideration of the jury in passing upon the question of the defendant's negligence.

One of the defendant's expert witnesses testified that he had on several occasions seen sparks, six inches in size, coming from a similar motor box, and that they were caused by an "accumulation of dirt, most always across the contacts; either a collection of dirt or a collection of moisture. I have never known these flames to come from any other causes."

The conductor of the car testified: "I knew the controller was out of order. The motorman told me that. I found it out as soon as the fuse blew. It was found out that the controller was out of order by looking inside the box. Q. What did you find inside the box? A. I saw that the works were black, and the motorman took the glove or handkerchief, or whatever he had, to wipe it off."

Thus it appears that there was no inspection of the car before it left the depot, on the trip in question; that the controller itself was out of order, and that this fact was easily discoverable, and, in fact, was discovered, by the subsequent inspection after the car was taken to the repair shop, that the motorman discovered something wrong about it, when he removed the outside covering, by reason of which the car was not permitted to continue its trip and was taken back to the shop. These facts required the submission to the jury of the question of defendant's negligence in the inspection and use of the car.

Another ground upon which negligence may have been imputed to the defendant arises out of the fact that after the flashing or flaming began, the motorman permitted the car to continue its course without stopping, to ascertain the cause of the flame, until a new element of apprehension was introduced, namely, the burning out of the fuse. The jury were entitled to take this matter into consideration in passing upon the defendant's negligence, so that whether the accident was caused by failure of inspection and the consequent use of the car of which the controller was not in good order, or whether it resulted from the continuing motion of the car after its dangerous condition might have

been and was discovered, the jury were justified in assuming the defendant's negligence.

It follows that the judgment must be affirmed, with costs.

Judgment and order unanimously affirmed, with costs.

NOTE.—See note 2 at end of Part III.

LILLIE LEONARD, Respondent, v. THE BROOKLYN HEIGHTS
RAILROAD COMPANY, Appellant.

New York Supreme Court, Second Department, January, 1901.

(57 App. Div. 125.)

ELECTRIC STREET RAILWAY—INJURY TO PASSENGERS CAUSED BY DEFECTIVE
INSULATION.

Plaintiff was a passenger on an open trolley car. There was evidence that the car "bucked," became enveloped in flames which broke out underneath and at the rear end of the car, that there was an explosion; and that the plaintiff became frightened at these manifestations, jumped from the car and was injured. There was also evidence that the accident was due to a "short circuit" caused by defective insulation; and that neither of two practical tests for such defect had been employed by the defendant.

Held, that the submission to the jury of the question of negligence, was proper.

Held, proper to add to a charge that the care required of the defendant was "not extraordinary care, but only the care that is necessary in reference to the use of the appliances and the danger incident to their becoming out of order," the words: "In the use of motive power like electricity, power of such appalling possibilities, it should be a very high degree of care."

Case of this series cited in opinion: *O'Flaherty v. Nassau Elec. R. Co.*, vol. 7, p. 535.

Appeal from judgment of Supreme Court, Kings County, upon the verdict of a jury in favor of the plaintiff, and also

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from order denying defendant's motion for new trial made upon the minutes.

I. R. Oeland (John L. Wells, with him on the brief), for the appellant.

Isaac M. Kapper, for the respondent.

JENKS, J.: The defendant appeals from a judgment entered on a verdict for plaintiff for \$12,750 for damages for personal injuries resulting from the negligence of the defendant, and from an order denying a new trial on the minutes.

The plaintiff's case is that on June 9, 1899, she was a passenger on an open trolley car of the defendant; that there was first heard an unusual bumping, rumbling noise at the bottom of the car called "bucking;" that this was heard by the conductor and the motorman, who continued the trip; that there shortly followed an outbreak of fire underneath the car and at the rear end, and that then came an explosion; that fire and flame enveloped the car; that a panic fell upon the passengers, and that the plaintiff in terror leaped from the moving car and was injured.

The appellant assigns error in the denial of the motion to dismiss made when plaintiff rested, and repeated at the close of the case. It contends that "before the evidence was ended, it was conclusively shown that the flames only came from the controller box on the front of the car as the result of the burning of one of the metallic fingers of the controller, due to a latent defect in the metal or causes against which the defendant could not provide." But in the record I read testimony of seven disinterested witnesses, bystanders, Ryder, Schenck, Hanlon, Collins, Lomain, Cortes, and Gibney, that the fire showed first beneath the car. At least two of them testify that it first appeared at the rear end. The appellant then states that "the fact that the flames did not envelop the entire car was conclusively proven by witnesses for plaintiff and defendant, and by physical facts in the case." But these same seven witnesses testify in effect (and many of

them used the very word) that the fire *enveloped* the whole car, and that it seemed to be "all on fire." And two of the defendant's witnesses, Phillips and Marsh, say substantially the same thing. I have noted enough, not all, of the testimony on this subject. So far as the "physical facts" are concerned, the appellant depends mainly upon the testimony of its employe Arnold that on the day after the accident he saw and operated the car with both motors; that, save the replacement of a controller finger, it was not repaired, that it was not burned; and upon the testimony of an employe that the car was put in service. I find no proof that the car was put in service, save a statement of Coburn, a shop man, which is vague and inferential. It is testified that, after the new finger was put in, the car was run up and down the depot. But Arnold saw twenty or more crippled cars every day, and his attention was first called to the car on the witness stand eight months after the accident. He said he had a memorandum, but he did not produce it, nor did he testify from it. He was asked: "Q. It is because of that general custom that you say you operated car 412? A. Yes, I tried it. . . . I try it to find if the car is out of order; I have a book and I know." He said that he could produce the book if he had it. Recess followed. But I find no further reference to the book. Arnold testified that it was not his business to repair the wiring, but he would call upon one of his men to fix it, one of the shop men, the controller men, or men that looked after the wires. "Q. (By defendant's counsel). If there were any repairs made to that wire, would you have known it? A. No, sir. Q. Were there any? A. No, sir." Ukert and Coburn did the repairing, and Arnold says that he asked them to repair it, and "it was repaired" when he got there in the morning. All that Coburn did was to put a finger on, and try that end of the car to see that it was all right. He put in a finger and operated the car from "the end I put the controller finger on, up and down the car house." "Q. Did you look for injuries to it? A. I looked no further on the car; no, sir." Ukert did nothing. It seems that

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these witnesses are still in the employ of the defendant or its successor. So far as any discharge of the duties of these witnesses to their employer is concerned, I think that their testimony, at best, was for the jury (*O'Flaherty v. Nassau Electric R. R. Co.*, 7 Am. Electl. Cas. 535, 34 App. Div. 74; *Volkmar v. Manhattan R. Co.*, 134 N. Y. 418), for though the car was not "inspected" by them previous to the accident, their subsequent "inspection" was work which they were employed to do, and consequently there was reason for their statement of a proper discharge thereof, which made their credibility a question for the jury. *Michigan Carbon Works v. Schad*, 38 Hun, 72; *Des Marets v. Leonard & Co.*, 12 Misc. Rep. 81; *Brown v. James*, 9 App. Div. 139; *McElwain v. Erie R. Co.*, 21 Wkly. Dig. 21.

After these propositions, the learned counsel for the appellant argues that inasmuch as it is "conclusively shown" that the defects were in the controller box, and as there was evidence that the particular controller box was inspected on the morning of the accident, and that there was no visible injury or sign of defect, therefore there can be no negligence brought home to the defendant. The vice in this argument is that it ignores the theory of the plaintiff which was supported by evidence. This theory is that the accident was due to the fact that the insulation of the electrical wires of equipment had become defective, and that in consequence there was a "short circuit," which caused the fire in the first instance. The defendant's witness, Cole, testified that "Short circuit is where two wires have worn against one another inside of the hose, worn through so that the wires are naked and come in contact. That is the result of defective insulation." The cables were affixed underneath the car so that they were exposed to dampness and to moisture, and so that they came in contact with rain or snow. It was shown that if wet or dampness penetrated the hose it tended to wear away the insulating material, and also that the vibration and jar of the car caused attrition which tended to wear away the insulating medium, and that both high temperature and moisture were also effective

causes of depreciation. There was no substantial dispute of those theories by the defendant's witnesses, and of those witnesses, Cole and Livermore admitted that if the fire and flames first appeared underneath the car on the rear thereof, and then on the sides and on the front, the fire might be due to some defect in the wiring of these underneath cables. The learned trial justice asked the defendant's witness, Cole, "If anything was on fire in the bottom of the car, it would indicate that there was some trouble, further on, beyond the motor box, beyond the fuse, would it? A. Yes, sir. . . . If the insulation was off, you could set the car on fire underneath? A. Yes. Q. If the car started on fire underneath, you could have fire both at the rear and front if the insulation of the cable was defective." Professor Sheldon, of the Polytechnic Institute, and Mr. Bausser, the plaintiff's experts, positively testified in answer to a hypothetical question that fairly stated the case, that defective insulation was the only specific cause of this disaster. Hence, there was evidence for the jury to determine whether the accident was due to defective insulation of the cable underneath this car; and, therefore, fairly arose the question whether the defendant had exercised due care in the inspection thereof. Professor Sheldon testified that any depreciation in the quality of insulation could be found by a weekly application of the magnetometer test made by one man in fifteen minutes; that it was a practical test for insulation beginning to wear away, so that considerable time might intervene the discovery of defect and the actual danger. Mr. Bausser testified that the volt meter test would show defective insulation. Mr. Cole, shop foreman in charge of the electrical depot at the Fifty-eighth street station, called by the defendant, testified: "If we wanted to detect the defective insulation in the cable having the wires together, we would test them, the identical wires, test them with a magnetometer. . . . We would not do it unless trouble arose in that point. The magnetometer test is the standard test to ascertain defective insulation, that is in a cable—for the short circuit in a cable.

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. . . We never make any test except after the cars are wired there is need of inspection to make a test if we are looking for trouble." He also testified that he had seen the volt meter test in use, that it was a common test known thoroughly to railroad men, and that "short circuit" is discovered by the use of these two tests, and that this test with the magnetometer was only made once in the spring of the year. He said further that the volt test would show the wearing away of the rubber insulation due to the vibration of the cars or to the dampness of the weather, even though the wires were not fully exposed. The defendant called its journeyman, Johnson, who testified that he tested the cable of the cars on the morning of the accident, and that it was in order. He says that he looked at it "for dampness," ran his hand over it, examined the leads in the cable, looked where the cable is liable to wear or burn off, and found everything all right. He could not see through the canvas holes, but he could feel any external dampness. He did not pretend to know the effect of dampness "getting on" the hose. "I felt it," he says, "just to see if it was damp, that is all." "Q. Just out of curiosity to see if you had a wet hose? A. Yes, I do that. There is something the matter when this thing gets damp, if soaked in water." "Q. By feeling, you found the exterior of the hose dry? A. Yes, sir. Therefore, everything was all right. I never did see any other test applied to ascertain as to the insulation besides putting your hand on the hose. I have seen testing machines." Here was testimony of standard tests (known to all railroad men) that would detect any defective insulation in time to avoid all danger, and that could be applied by one man in fifteen minutes, that would reveal any occult depreciation in insulation, met by evidence that a journeyman had made an inspection by looking and placing his hand on the cable for dampness. Dampness might have lodged within, and attrition might also have worn the insulation away. On that very morning, though the cable may not have been outwardly

worn away, nor externally damp, insulation might have depreciated to the point that fire and flame were ready to burst out. Can it be said, as matter of law, that the inspection of Johnson, coupled with the standard tests applied "in the spring," freed the defendant from the province of the jury? In *Palmer v. D. & H. C. Co.*, 120 N. Y. 170, 177, the court held that "the apparent necessity for frequency of examination is somewhat dependent upon the liability to impairment and the consequences which may be apprehended as the result of defective condition. But whether the system and the manner of its execution are all that may be required of the carrier cannot be measured by any rule of law to be applied by the court. It must, in view of the circumstances appearing by the evidence, be one of fact for the jury to determine upon proper instructions relating to the degree of care imposed upon the company; and while it is true that the question of fact so presented is somewhat speculative, in the sense that it is not measured by any definite rule, it must, nevertheless, become a matter of judgment to be expressed by the jury and founded upon the evidence."

Defendant's witness, Arnold, who inspected all of the cars, was asked on cross-examination: "How many cripples a day come into your depot of these Nassau cars? Mr. Oeland: I submit that's an improper question unless this is shown to be the same kind of a car. (Objection overruled. Defendant excepts.)" It is now urged that the sole purpose of the question was to prejudice the jury. The term "cripples" was taught to the plaintiff's counsel by the witness, who said: "I don't inspect only those cars that come in as crippled." The learned counsel for the defendant argues that the question was not germane to test the memory of the witness because he had made a written memorandum at the time and was "practically testifying from that memorandum." He did claim that he had made a memorandum, but he never produced it. It appears that a considerable number of crippled cars came into the shops every day; that eight months had elapsed between the time of the accident and the trial, and

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that the attention of the witness was first called to this car when he went on the stand. It was entirely competent on cross-examination to test the memory of the witness as to that particular car, and, to that end, to ascertain how many cars passed under his observation every day.

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It is contended that the court erred in charging the jury as to the degree of the care resting upon the defendant. The learned court had charged: "A railroad company is not the insurer of the safety of passengers, but its servants are bound to do all that man can do in the way of vigilance to protect them. They are bound to provide the most safe appliances and to use the highest degree of care to see that the appliances do not get out of order after they are put in use. Now, there are but very few things in the world that do not wear out in time; but the defendant's duty was, as I have told you, to use the very highest degree of care, prudence and vigilance in seeing to it that the electrical appliances in use on the car did not get out of order, and so endanger the safety of passengers." At the close, the learned counsel for the defendant made this request: "I ask the court to instruct the jury that the care required of the defendant is not extraordinary care, but only the care that is necessary in reference to the use of the appliances and the danger incident to their becoming out of order. The Court: That is true; in the use of motive power like electricity, power of such appalling possibilities, it should be a very high degree of care. Mr. Oeland: I except to the modification, and to the refusal of the court to charge as required." The learned counsel says the proof in the case was "that the result of a finger burning out in the controller was usually a flash of flame, of fire, from six inches to a foot high. . . . We submit that the care required should be commensurate with the danger to be anticipated, and that as to the controller, that the care required would be only ordinary care commensurate with the result to be expected from the appliance coming out of order." But the theory of the plaintiff was not that a flash

leaped up from the controller, but that the car was first on fire as the result of the defective insulation of the cables at the bottom of the car, and that the burning of the controller was merely an incident to the flame and fire that enveloped the entire car. Even assuming the proposition sound, there was no limitation in the language of the request, and so the criticism wholly disregards a vast deal of testimony in the case that substantiates the theory of the plaintiff. The learned counsel himself writes in another part of his points: "The rule as to inspection we understand to be a high degree of care to keep the appliances and running gear of the cars in order. *Stierle v. Union Railroad Company*, 156 N. Y., page 74, and motion for rehearing, page 684; *Palmer v. D. & H. C. Co.*, 120 N. Y. 174." I assume, then, that the objection of the learned counsel is to the word "very." In view of the charge considered in the opinion of Mr. Justice WILLARD BARTLETT, in *Koehne v. N. Y. & Queens County R. Co.*, 32 App. Div. 419, 421; *affd.*, 165 N. Y. 603, I think that Mr. Justice MAREAN was warranted in the expression now criticized. The decision in that case is a sufficient statement of my reasons.

The learned counsel for the appellant asked the court: "I ask your honor to charge—this is a modification of the charge already requested—if they believe that the railroad company used care in the selection of the controller in this case, and inspected the same, and that the inspection was sufficient under ordinary circumstances and commensurate with the dangers incident to its use, even if it did blow out, they should find for the defendant, if, in the exercise of that care, they believe the defect could not have been discovered." The court declined, under exception, and very properly declined, inasmuch as here was a request that, in effect, entirely ignored the theory of the plaintiff, namely, that the fire was due to defective insulation and started at the bottom in the rear of the car, and that it was not primarily due to the controller or to any defect therein. The learned counsel did not limit his request by the supposition,

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if facts showed that the cause of the fire was the controller alone, or defects therein, or that it was confined thereto.

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The judgment should be affirmed, with costs.

SEWELL, J., taking no part.

Judgment and order unanimously affirmed, with costs.

NOTE.—See note 2 at end of Part III.

MARY A. BUCKBEE, Respondent, v. THE THIRD AVENUE RAILROAD COMPANY, Appellant.

New York Supreme Court, Appellate Division, Second Department, October, 1901.

(64 App. Div. 360.)

INJURY BY SHOCK TO PASSENGER LEAVING TROLLEY CAR.

Plaintiff, while riding in an underground trolley electric street railway car, became alarmed at the sight of flames shooting from the controller box, and left the car. In stepping on or over the metal door-sill, she felt a shock, a numbness and stinging sensation in feet and limbs and severe pain in the back. Three physicians who examined the plaintiff, testified that her condition might have been caused by an electric shock, and one that it probably was so caused. Plaintiff was in perfect health previous to the accident. The flames extended the length of the car, and were preceded by a loud report. *Held*, sufficient *prima facie* evidence to establish the fact of injury by electric shock.

Appeal by defendant from judgment of Supreme Court, Westchester County, entered upon a verdict, and from order denying motion for new trial upon the minutes.

Eugene Treadwell (*Henry L. Scheuerman*, with him on the brief), for the appellant.

S. S. Whitehouse, for the respondent.

HIRSCHBERG, J.: The plaintiff's judgment was recovered for damages alleged to have been sustained while she was a passenger on defendant's road. She was on a south-bound car on Third avenue, and as it approached One Hundred and Twenty-first street she became alarmed at the sight of flames shooting from the controller box and left the car. In stepping on or over the metal door sill at the rear of the car she claims to have received an electric shock, resulting in the condition of injury of which she complains.

The learned counsel for the appellant earnestly insist that there is no evidence in the case that she received an electric shock. There is evidence from which the jury might legitimately draw that inference. She was in perfect health and vigor at the time. She had no previous accident and no previous disease occasioning any of the symptoms which appeared immediately after the occurrence and which have since continued. The car was operated by electricity communicated from underground, and one witness testified that the flames extended beneath the car its entire length. The appearance of the flames was preceded by a loud report or explosion. Another witness testified that the flames started in front and went underneath the car, burning a long while. The plaintiff testified that as she was stepping through the doorway she felt a "shock" in her feet, and, to quote her words, "a numbness and a stinging sensation in my feet as I was about to go out of the door of the car. I felt that sensation in the soles of my feet; it extended up my legs up above the knee; it was a stinging, prickly sensation in the feet and numbness in the limbs, and I experienced severe pain in the back, the lower region of the spine." A physician who examined her within two hours of the occurrence testified in detail to her condition at the time, and further testified that an electric shock received under the circumstances narrated by the plaintiff was adequate to cause it. On cross-examination he testified that, while a blow or any injury in the lumbar region might also be an adequate cause, he found no marks or evidence of such a blow or injury, and that in his opinion "if the lady received no electri-

cal shock whatsoever, she probably would not have been in the condition that she is." On direct examination he stated that, assuming the plaintiff to have been strong and healthy on the day of the accident, having received no previous injury, and having then experienced the sensations described, he could not tell how the condition in which he found her was occasioned unless it came from the electric current. Two other physicians who examined the plaintiff gave evidence of the existence of permanent injury which they said an electric shock received at the time, under the circumstances, and accompanied by the sensations described by her, would be sufficient to produce.

There was no medical or other expert evidence to the contrary. This was abundantly sufficient to establish a *prima facie* case of injury resulting from electric shock. The plaintiff's statement that she experienced a shock accompanied by the sensations which she described is certainly some evidence that it was an electric shock, especially in view of the fact that at the time there were palpable manifestations that in some manner the electrical equipment of the car had become deranged and the electrical current was obviously escaping. The symptoms immediately developed in the plaintiff, and the resultant permanent physical impairment being of such a character as an electrical shock would or could create, and being ascribable under the circumstances to no other known agency, furnish additional proof to the same effect. Whether the resulting condition would of itself be sufficient proof of the suspected cause is not the question. It has often been held that an ascertained condition of suffering or disease may be ascribed to a known previous injury on proof that the latter was sufficient to produce the former; and the logic of such decisions would probably warrant the conclusion that the existence of the condition might well be regarded as some proof of the necessary prior injury, especially where the circumstances of the case exclude every other origin. As was said by the court in *Matteson v. New York Central Railroad*, 35 N. Y. 487, 490:

"Assuming that the witnesses were truthful, and that their testimony established the fact that Mrs. Matteson was suffering from an affection of the spinal column. which tended to paralysis, it was impossible to prove, by direct evidence, and with absolute certainty, from what cause the affection proceeded. *Something was necessarily left to inference*; not a merely speculative, but a rational inference, based upon all the circumstances of the case. The testimony, including that of the physicians, authorized the jury to find that, previously to the accident, Mrs. Matteson was free from a disease of the spine, tending to paralysis; that, immediately thereafter, a disease of that nature began to be exhibited, and was, subsequently, manifested in increased force until the time of the trial; that, on the occasion of the accident, she received a jar or blow that was sufficient to produce such disease; *and that no other cause was shown to which it could be reasonably ascribed*. If the jury were satisfied of the truth of these positions, they were fully authorized, if not required, to find that the plaintiff's hypothesis, respecting the nature and effects of the injury produced by the accident, was correct." See, also, *Turner v. City of Newburgh*, 109 N. Y. 301, 308; *Stouter v. Manhattan Railway Company*, 127 id. 661, 665; *Keane v. Village of Waterford*, 130 id. 188; *Quinn v. O'Keeffe*, 9 App. Div. 68.

What has been said disposes of most of the objections raised in opposition to the hypothetical questions permitted by the court to be asked the medical witnesses. Other objections have been examined and found not well taken, or not applicable to any inaccuracy which may have been exhibited in the framing of the questions. It also serves to distinguish the case from *Mitchell v. Rochester Ry. Co.*, 151 N. Y. 107, wherein it was held that there can be no mental shock unconnected with a direct physical attack. Assuming that the doctrine of that case is applicable to a common carrier engaged in the actual transportation of a passenger for hire, the shock occasioned by contact with an electric current must be regarded as a direct physical and

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personal assault for which a negligent defendant may be held liable. Besides, the jury was instructed that there could be no recovery for mere fright, or for its consequences.

The defendant's negligence was not only established by the evidence already reverted to, but also by proof that the phenomenon described could not have existed if the electrical appliances of the car were in proper shape. There was evidence that the car after the accident was used the same day on four through trips without further harm, but there was no evidence of any subsequent inspection, and no direct evidence that it was not out of order. Under these circumstances the positive evidence was not sufficient to justify the assumption that the defendant was free from blame as matter of law. The question of the defendant's negligence, and all other questions arising in the case, were submitted to the jury in a charge that was thorough, fair, accurate and impartial, to which no exception was taken by the defendant.

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The judgment and order should be affirmed.

Present: GOODRICH, P. J., WOODWARD, HIRSCHBERG, JENKS and SEWELL, JJ.

Judgment and order unanimously affirmed, with costs.

NOTE.—See note 2 at end of Part III.

MILES V. THE POSTAL TEL. CABLE CO.

SETZLER V. SAME.

South Carolina Supreme Court, June 28, 1899.

(55 S. C. 403.)

INJURY TO BUILDING BY LIGHTNING CONVEYED BY TELEGRAPH WIRES.

In an action based upon the destruction of a store-house and its contents by lightning, it being charged that the electric current was con-

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ducted to the building along a telegraph wire which the defendant negligently allowed to come in contact with the building, *held*:

That the question whether the fire was due to the negligence of the telegraph company, or was an act of God, was properly submitted to the jury.

That the trial judge properly refused to charge the jury that the plaintiff could not recover if he erected his building, though upon his own land, dangerously near the telegraph appliances.

That the court properly refused to charge that the plaintiff was bound to exercise the same prudence, diligence and care in the erection of his building as was the defendant in the erection of its lines in the streets. Certain requests to charge held properly refused as having no application to the case.

Certain instructions to the jury held not to be charges on the facts.

Case of this series cited in opinion: *Mitchell v. Charleston Light & Power Co.*, vol. 6, p. 244.

Appeal by defendant below.

Mordecai & Gadsden, for appellant.

Graham & Nelson, for respondents.

POPE, J.: The foregoing actions, though separate and distinct, involve practically the same questions, and will be disposed of together; for the plaintiff Miles owned the building in which was stored the goods of the plaintiff Setzler, which building and stock of goods were destroyed by the same fire on the night of the 20th of June, 1897, and which said fire both plaintiffs alleged was communicated through one of the telegraph wires which the defendant carelessly and negligently permitted and allowed to become loose on one of the insulators attached to the telegraph pole just in front of the storehouse of the plaintiff Miles, thereby causing said telegraph wire to sag and fall upon a frame attached to the front of said storehouse, and convey a current or currents of electricity, by which said storehouse and said stock of goods were burned and destroyed to the damage of the plaintiff Miles \$300, and to the damage of the plaintiff Setzler \$500. The defendant's answer set up the defense that it was authorized, under an Act of Congress passed in 1866, and subsequent

amendments thereto, to construct its lines of telegraph upon highways and post roads of the United States, of which highways and post roads it claims the road in Lexington county, State of South Carolina, wherein its telegraph line was located in front of the storehouse of the plaintiff Miles, to be one, and that the said defendant, the Postal Telegraph Cable Company, was operating under the interstate commerce provision of the United States constitution, having its lines of telegraph leading from other States to the west of South Carolina through said State of South Carolina to other States on the east of said State of South Carolina. It denied all the allegations of fact embodied in the complaint. It set up two other affirmative defenses: First, that the fire which occasioned the loss to plaintiff was the act of God; second, that plaintiffs were guilty of contributory negligence, by reason of building such storehouse so close to defendant's telegraph line that such structure and building encroached upon the post road and highway whereon the defendant had already constructed its telegraph line. Both sides to the controversy introduced testimony at the hearing before Judge ERNEST GARY and jury at the September Court of Common Pleas for Lexington county. A verdict was rendered in each action for the plaintiff. The defendant now appeals in each case.

The ninth exception questions the ruling of his honor, the Circuit judge, whereby he refused to allow the admission in evidence of the rule of the Society of American Electrical Engineers concerning the construction of wires. The record disclosed that the defendant had an electrician as an expert, who testified as to the construction of wires, and was asked to testify from a book as to the tensile strength of No. 10 wires, and such testimony was admitted without question. This witness was a member of this Society of American Electrical Engineers. It nowhere appears in the record that there was anything in these rules which defendant wished to have spread before the court. Unless some purpose of a material character was manifested, whereby the admission in evidence of these

rules of the Society of American Electrical Engineers was rendered necessary, we are not able to see how the defendant has been injured by this ruling of the Circuit judge. This exception is therefore overruled.

The eleventh exception complains that the witness Leis Longford, who was the county supervisor of Lexington county, in the State of South Carolina, and as such officer had control of all the highways and public roads of such county, was allowed to testify that the telegraph line of the defendant was not, in front of plaintiff Miles' storehouse, on a public road or highway. We cannot see how there could be any objection to this testimony, especially in view of the further facts that the public did not work the road in question, and that it had been used only for a few years, being opened by private parties for their own convenience. Let the exception be overruled.

All the remaining exceptions relate to alleged errors of omission or commission of the Circuit judge in his charge to the jury. Let the charge of the Circuit judge be reported. The first exception imputes error to the Circuit judge because he used this language in his charge: "Was the fire due to that cause [because the defendant carelessly and negligently allowed one of its wires attached to the telegraph pole in front of plaintiff's store to become detached from a defective insulator, and to swing and fall upon the frame in front of the plaintiff's store, and thereby convey a current of electricity to the plaintiff's store, which caused it to ignite and burn down], or was the fire due to an act of God? And, in determining this issue, you will determine whether the storm caused the wire to break by reason of the fact that the store was on fire and heated the same, and caused it to break and become defective, or whether the wire, by reason of the defects complained of, caused the store to ignite,"—in that, in using the language herein quoted, his honor charged upon the facts. We understand that, in this charge of the Circuit judge, he merely stated the issue between these contending parties, and that in so stating the issue the

attention of the jury was called to the requirements of the law in correctly determining such issue by the testimony. The Circuit judge did not undertake to state the testimony in that part of his charge here construed. The plaintiff contended in his complaint that the fire which consumed his storehouse was communicated through a defective telegraph wire which led a current or currents of electricity thereto. The defendant did not deny in its answer that the storehouse and the stock of goods therein were destroyed by fire, but insisted that the fire was communicated to the store by an act of God, for which it was in no wise responsible. Such being the case, and especially in view of the requests of the defendant to the Circuit judge for his charge to the jury which was charged, we do not think that the Circuit judge charged upon the facts, in violation of the mandate of the constitution. This exception is overruled.

The next allegation of error consists in the refusal of the Circuit judge to charge "that if the jury find that the plaintiff herein purchased the land upon which the building in question was situated, subsequent to the completion, or erected the building subsequent to the completion, of the said lines by the defendant, and placed the building so that it encroached upon the line of the defendant's poles and wires, and too near to the same, then I charge you that the plaintiff contributed to the alleged injury complained of, and is not entitled to recover." There was no testimony that the building encroached upon the line of the defendant's poles and wires. There was no testimony that plaintiff's storehouse was not upon his own land. As far as the testimony went was that the plaintiff's said storehouse was near to and opposite a pole of defendant's whereon wires were strung. Such being the case, the circuit judge had no right to charge a proposition covering an encroachment upon the line of defendant's poles and wires by the plaintiff. A man has the right to the use of his own property—which means every part of it; and such proprietor is not to be stigmatized as encroaching upon the line of poles and wires of a telegraph com-

pany, simply because he builds a house on his own land opposite to a pole and wires of a telegraph company, located on a way or road opposite to such lands of a private owner. On the contrary, it behooves a telegraph company, in its legal use of a way or road, or even a highway or post road, to guard such use so that no injury shall result to the property of its owner which may be located opposite such telegraph lines through its negligence or want of due care. The circuit judge was right in his denial of this request, and therefore this exception is overruled.

The appellant next claims that the circuit judge should have charged: "(6) It is alleged on the part of the company that, if this wire was broken, it was in consequence of a severe wind-storm. Was it an ordinary day, such as is liable to occur at that time of the year? Or was it one that could not be anticipated? The law does not require impossibilities. If a cyclone, that could not be anticipated or reasonably foreseen, was the cause of that wire falling, and the company was not negligent in allowing it to remain there for an unreasonable length of time, then, under these circumstances, it would not be liable. But if the accident was due to the wires being improperly erected or improperly maintained in repair, or, having been properly erected, were broken and allowed to remain on the roadway an unusually long time, then, if the injury of the plaintiff occurred under those circumstances, the company would be liable to compensate him in damages, if such negligence was the cause of the injury for which he sues. Negligence is the want of due care. That expresses it in few words. Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person, under existing circumstances, would not have done; the essence of the fault being either in the omission or commission." This request to charge is taken from printed charge of Judge ERNEST GARY in the case of *Mitchell v. Light & Power Co.*, 6 Am. Electl. Cas. 244, 45 S. C. 146. It is admitted that what was law four years ago should be law to-day. A principle of

law announced in *Mitchell v. Light & Power Co.*, *supra*, should be accepted in the case at bar, with the proviso, however, that the two cases should be similar. Is the case at bar similar to that just cited? On the 16th of December, 1893, during the prevalence of a violent windstorm, one of the electric wires of the defendant, the light and power company, fully charged with electricity, broke, and the two severed ends rested on the ground in one of the thoroughfares of the city of Charleston, S. C. At 3 o'clock P. M. the plaintiff, Mitchell, while passing through this thoroughfare, was badly injured by the fallen wire. The action was instituted to recover damages for such injuries. The plaintiff, Mitchell, charged negligence on the part of the defendant, in that it permitted its wires, charged with electricity, to hang suspended over the thoroughfare of a city so as to become dangerous to passengers on the street, and that the plaintiff, a passenger, was seriously injured, etc. The defendant, the light and power company, joined issue on these allegations, and set up the defense of contributory negligence on the part of the plaintiff, Mitchell, and also the further defense that the injury resulted from the act of God. Now, the facts of the case at bar are distinct. There was no allegation in the pleadings nor in the testimony that there was any storm of wind on the night of the 20th of January, 1899, but rain and lightning. So, therefore, the circuit judge would have been in error if he had charged as requested, because no windstorm or cyclone existed in the case at bar to break wires. Defendant in the case at bar urged that lightning—an act of God—is what set fire to plaintiff's property. There was no question in the case at bar as to what broke the wires of the telegraph company. It was either the act of God or the burning of the storehouse. It was one of the two. This exception is overruled.

The fourth, fifth, and sixth exceptions are as follows: "Fourth. Because his honor refused to charge: (7) I further charge that the law does not require impossibilities of any person, natural or artificial; nor does it require that the defendant

should have ready for service at every moment, and at every point of exposure, an adequate force to overcome a sudden fracture of wire, or any other like casualty, in the shortest possible time. All that it can be required to do in this connection is to maintain an efficient system of oversight, and to be prepared with a competent and sufficient force, ready to furnish within a reasonable time a proper remedy for all such casualties as there is reasonable ground to anticipate might occur.' Fifth. Because his honor refused to charge, '(8) I further charge you that, if you find that the wire fell from the defendant's pole, the defendant was entitled to a reasonable time after the falling of the wire to repair it or remove it; and, if the jury find that the injury to the complainant occurred before the expiration of such reasonable time, then the plaintiff is not entitled to recover anything in this action. If they removed or repaired the wire in a reasonable time, and were not negligent in allowing it to remain on the highway, then they would not be liable, because want of due care would not be established.' Sixth. Because his honor refused to charge: '(9) I further charge you if the jury find that if between the time when the defendant received notice of the breaking of the wire, if the proof shows that they ever received such notice, and the time at which the alleged injury occurred, there was no reasonable time in which the defendant could have repaired the wire or could have removed it out of the way, then their verdict must be in favor of the defendant.'" These exceptions are substantially copied from the charge of his honor, Judge ERNEST GARY, in the case of *Mitchell v. Light & Power Co.*, *supra*, and were refused, not because the propositions embodied therein were not sound law, but because such propositions of law had no connection with the case at bar. In this we think the circuit judge did not err. The exceptions are therefore overruled.

The seventh exception is as follows: "Seventh. Because his honor refused to charge: '(10) I further charge you that if you

find that the defendant in this case was lawfully upon the continuation of Center street, either by the fact of its being a post road of the United States, or upon the property of John R. Shuler by his permission, and that such condition existed before the plaintiff could have, in this case, either acquired the land or built the building thereupon, then no notice to the defendant company to remove its pole or wires given by the plaintiff in this action, if such notice were ever given, can render the defendant liable in this case, because, the plaintiff having acquired the property after the erection of the defendant's plant, it was the plaintiff's duty to place his building sufficiently far from the defendant's plant to reasonably prevent any danger of accident; and it was incumbent upon the plaintiff to exercise the same prudence, diligence, and care in the erection of his building as is imposed on the defendant in the erection of its lines on the said highway.' " The circuit judge had charged to the jury much of this request in charging defendant's second request to charge, as will be seen from this quotation from the charge: "(2) If the jury find that the defendant in this case, the Postal Telegraph Cable Company, was at the time of the injury complained of, and previous thereto, a telegraph company duly incorporated and organized under the laws of the State of New York, and that it had accepted the provisions of the Act of Congress of July 24, 1866, and that under the provisions of that act and the acts of Congress amendatory thereof, it had erected its poles and wires along the continuation of Center street, just outside of the corporate limits of the village of New Brookland, and that the land upon which it erected its poles and strung its wires was the property of John R. Shuler, and that he gave permission for the erection of the said line, and has never revoked such permission, then I charge you that the defendant lawfully erected its lines upon said continuation of Center street, and that it had a right to work and operate said lines of poles and wires upon said continuation of Center street. I charge you further that, if this is the land of Mr. Shuler, whether he gave the company per-

mission to erect a telegraph line on his land or not, if it is erected there and in operation, no third party can punish the telegraph line upon the ground that it is on land of Mr. Shuler without his consent. Mr. Shuler is the party to make that objection, and not the third party." It will be thus seen that the circuit judge was quite careful to cover the rights of the defendant in his charge to the jury, when the defendant asked the judge to charge that any ordinary usage of a man's property (by which is meant when no extraordinary use is made of property, such as a powder magazine, electric plant, or some such dangerous use), does not necessitate anything more in such proprietor than a due respect to the rights of others, and could not be construed to mean that such proprietor of land must exercise the same prudence, diligence, and care as that imposed by law upon the owner of an electric system. No doubt, this was the circuit judge's view of the matter. Let this exception be overruled.

"Eighth. Because his honor refused to charge: '(18) I further charge you that an injury that is the result of many fortuitous circumstances, no one of which can be fairly said to have been its proximate cause, is an accident, and is not actionable.'" We think the circuit judge could scarcely be called upon to charge the jury upon the effect of "many fortuitous circumstances" in relation to the proximate cause of an event. We think, however, the circuit judge gave the jury sound propositions of law when he charged, at defendant's request: "The eleventh I give you: 'I further charge you that an injury that could not have been foreseen or reasonably anticipated as the probable result of an act of negligence is not actionable.' That I charge you to be the law. The twelfth I give you: 'I further charge you that an injury that is not the natural consequence of an act of negligence, and that would not have resulted from it but for the interposition of a new and independent cause, is not actionable.'" This exception is overruled.

Appellant's next exception is: "Tenth. Because his honor erred in holding as follows: 'The test is, was that so built?

Would a man of ordinary prudence and foresight and reason build them in the condition that was? Any rule that does not come up to that mark is not competent.' " We might decline to consider this exception in its present shape, but, inasmuch as it is near the end of appellant's exceptions, we will pass upon it. As we understood it, when the circuit judge was passing upon the question of the admissibility of the rule of the Society of the American Electrical Engineers as to the construction of wires, etc., and after he had held such testimony incompetent, Mr. Mordecai, as defendant's attorney, said: "It was not unusual or improper to authorize these lines to be built, and to be as near in proximity to this building as it was." Then it was that the circuit judge remarked: "That would not be the test. The test is: Was that so built? Would a man of ordinary prudence and foresight and reason build them in the condition that was? Any rule that does not come up to that mark is not competent." Thus it is made manifest that this was no charge of Judge GARY to the jury. It was more like a running discussion between lawyer and judge relating to the care required of a telegraph company in the construction of its lines. And this discussion was after the judge had already decided that such rules were incompetent. Let the exception be overruled.

The last exception is as follows: "Twelfth. Because his honor erred in using the following language: 'I mean by that this: If a telegraph line is so constructed as not to be properly insulated to carry off a current of electricity, and by reason of the defect, and the close proximity to the property of another, induced the agency of any force, by the act of God, to destroy the property (in this case, say, through the careless management or careless erection or maintenance of this line), then the party would be responsible,—would be indirectly conveying the act of God to this particular property, under these circumstances,—in that, using the language herein quoted, his honor charged upon the facts.' We cannot view the language of the circuit judge as in any wise commenting upon the testimony offered.

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All he is doing in what he says is to illustrate the rule of law governing telegraph companies. Let the exception be overruled.

It is the judgment of this court that each of the judgments appealed from in the two causes heard together be affirmed in this court, and that the clerk of this court send a remittitur down in each entitled action.

NOTE.—See note 2 at end of Part III.

J. C. GRIFFITH, Administrator, v. NEW ENGLAND TELEPHONE
AND TELEGRAPH COMPANY.

Vermont Supreme Court, Sept. 19, 1900.

(72 Vt. 441.)

DEATH BY LIGHTNING CONVEYED OVER TELEPHONE WIRE.

(Head-note to official report):

The business of maintaining and operating a telephone line, as shown by the evidence referred to in the opinion, is one that requires special knowledge and skill in the construction, inspection and repair of the line and instruments, and in the use of known and approved devices, if any there be, to guard against harmful effects to persons and property from electricity which may be conducted over the line and into the instrument.

It follows that a telephone company, in contracting to place and maintain its instruments in connection with its wires for the use of its patrons in dwellings and other buildings, in the absence of stipulations to the contrary, is deemed to have undertaken to possess and exercise special knowledge and skill in respect to the maintenance and operation of a telephone line.

If, in the exercise of the care of a prudent man in like circumstances, a telephone company has reasonable grounds to apprehend that lightning will be conducted over its wires to and into a house, in which it has placed one of its instruments, and there do injury to persons or property, and there are known and approved devices for arresting or dividing such lightning so as to prevent such injury therefrom, then it is the duty of the company to exercise due care in selecting, placing and maintaining such known and approved devices as are reasonably neces-

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sary to guard against accidents fairly to be expected to occur from lightning when conducted into a house over telephone wires.

When there is evidence to show that an injury was inflicted by a portion of a diffused bolt of lightning, such that it could be controlled when upon a telephone wire by the use of known and approved appliances, and the jury so find, the general question of whether a bolt of lightning can be controlled, in its passage from the clouds to the earth, by any human agency, is not involved.

In this case there was evidence tending to show that the decedent, while sitting under a telephone instrument, maintained in his house by the defendant company under a contract with him, was killed during a sudden storm by a portion of a diffused bolt of lightning carried into his house and to said instrument over the defendant's wire, and that the portion of the force of lightning by which he was so killed might have been safely conducted to earth by known and approved appliances, and that such appliances were not provided by the defendant. There was, therefore, evidence from which the jury might find that negligence on the part of the defendant was the cause of the decedent's death.

Upon the question of contributory negligence on the part of the decedent, the evidence was not so decisive either way as to leave no room for reasonable doubt or opposing inferences, and that question was, therefore, properly for the jury.

The facts, circumstances and surroundings, which the evidence tended to show, might properly be considered in the light of the common and extensive use of telephones and the manner and places of their use.

Cases of this series cited in opinion: *Brown v. Edison Elec. Illum. Co.* of Baltimore, vol. 7, p. 576; *McKay v. Edison Elec. Illum. Co.*, vol. 6, p. 223; *Griffin v. United Elec. Light Co.*, vol. 6, p. 252; *Perham v. Portland Gen. Elec. Co.*, vol. 7, p. 487.

Appeal by defendant from judgment rendered upon a verdict for plaintiff, Rutland County.

G. E. Lawrence and Butler & Moloney, for plaintiff.

Hunton & Stickney, for defendant.

START, J.: The evidence tended to show that the plaintiff's intestate, Dr. Sawyer, was killed by lightning while sitting in his house, under a telephone instrument owned by the defendant, and by the defendant there placed, maintained, and connected with its telephone line and instruments under a contract to do

so for a stipulated rent to be paid by the deceased. The plaintiff claims that the lightning came to and entered the house over the defendant's telephone wire; that the defendant was negligent in that it did not provide and maintain, in connection with its wires and instruments, any appliance to conduct the lightning to the ground, or out of the house, without injury to the inmates therein; and that the deceased came to his death by reason of such neglect. It appears that telephone wires from strokes of lightning, atmospheric conditions, and by coming in contact with electric light and trolley wires, may become charged with electricity so as to endanger life and property. And the evidence tended to show that, in the absence of proper appliances and ground connections, a current of electricity may jump from a telephone wire or instrument. In view of these facts, and others that will be herein referred to, it is clear that the business of maintaining and operating a telephone line is one that requires special knowledge and skill in the construction, inspection, and repair of the line and instruments, and in the use of known and approved devices, if any there be, to guard against harmful effects to persons and property from electricity which may be conducted over the line and into the instruments, and the defendant, in engaging in the business, and in contracting to place and maintain its instruments in connection with its wires for the use of its patrons in dwellings and other buildings, in the absence of stipulations to the contrary, is deemed to have undertaken to possess and exercise such knowledge and skill. 10 Am. & Eng. Ency. Law (2d Ed.), 872; *Brown v. Edison Illuminating Co.* (Md.), 7 Am. Electl. Cas. 576, 46 L. R. A. 745; *McKay v. Southern Bell Telephone Co.*, 6 Am. Electl. Cas. 223, 111 Ala. 337, 56 Am. St. Rep. 59; *Griffin v. United Electric Light Co.*, 6 Am. Electl. Cas. 252, 164 Mass. 492, 49 Am. St. Rep. 477; *Perham v. Portland Electric Co.*, 7 Am. Electl. Cas. 487, 33 Oreg. 451, 72 Am. St. Rep. 730. Having undertaken to place and maintain the instrument in the house, and connect it with its telephone line for the use of the deceased, in

so doing it was under a duty to exercise the care of a prudent man in like circumstances. If, while in the exercise of such care, it had reasonable grounds to apprehend that lightning would be conducted over its wires to and into the house, and there do injury to persons or property, and there were known and approved devices for arresting or dividing such lightning so as to prevent injury therefrom to the house or persons therein, then it was the defendant's duty to exercise due care in selecting, placing, and maintaining, in connection with its wires and instruments, such known and approved appliances as were reasonably necessary to guard against accidents that might fairly be expected to occur from lightning when conducted to and into the house over its telephone wires. The questions reserved for consideration are whether the evidence tended to show a neglect of duty on the part of the defendant in these respects; and whether the deceased, while in the exercise of due care on his part, came to his death by reason of such neglect.

The evidence tended to show that at the time Dr. Sawyer was killed one of the defendant's telephone poles was struck by lightning at a point about one-quarter of a mile northeast of Dr. Sawyer's house; that the lightning seemed to spread and go in different directions, the wires being lit up, and seeming to be all ablaze; that this pole was split in two, and several other poles in the immediate vicinity, and in the direction of Dr. Sawyer's house, were injured, and the wire severed; that at a point a mile and a half beyond Dr. Sawyer's house the wire was wound around a lead pipe that was found to be melted, and in the opposite direction from Dr. Sawyer's house, at Putnamsville, traces of electricity were found upon an instrument; that just before the lightning struck the defendant's telephone line Dr. Sawyer was seen sitting in his house, under the telephone instrument, reading from a book; that, just after, his hair was discovered on fire, and red lines were found extending down his neck, chest, and side; that the traces of electricity were found on the carpet, paper, and floor under the chair in which he was sitting; that

these were the only marks to indicate that lightning had entered the house; that no device as a safeguard or protection against electrical disturbances was attached to or connected with the instrument, except on top, where there was a device, consisting of two metal plates, which, to be complete, should be furnished with a wire attached to one of the plates and running to the ground, and between the two plates was a plug intended to "short current the two plates without entering the bell cell," but, owing to a defect in the construction of the instrument, the plug did not serve the purpose for which it was intended. This testimony tends to show that when the lightning struck the defendant's telephone poles it diffused, and went to earth by telephone poles in the immediate vicinity, and over a wire leading to Putnamsville, and in an opposite direction over a wire to Wheeler's; and that in going to earth by way of Putnamsville a part of the current passed over the wire to and into Dr. Sawyer's house. In the absence of any other strokes of lightning at that time in the vicinity, and of any marks about the house that indicated that lightning had entered it in any other way, the jury could properly infer from the facts which the evidence tended to show that the lightning which killed Dr. Sawyer came to and entered the house over the defendant's telephone wire. The defendant contends that the force which killed Dr. Sawyer could not have been controlled, diverted, or interrupted by human agency. A determination of this question requires a consideration of the evidence. As we have seen, the evidence tended to show that the lightning struck the defendant's telephone pole a quarter of a mile from Dr. Sawyer's house; that it diffused, and went to earth by several different routes; and that only a small portion of that force went to Dr. Sawyer's house. If the jury found as this evidence tended to show, then they were not called upon to find whether any human agency can control the course of a bolt of lightning in its passage from the clouds to the earth. In that event they were only required to find whether the course of such part of a bolt of the lightning

as the evidence tended to show went to Dr. Sawyer's house can be controlled when it is upon a telephone wire, and in this connection the question was whether the particular force which the evidence tended to show passed over the defendant's telephone line and killed Dr. Sawyer could, by proper ground connections, and by the use of known and approved appliances, have been controlled or diverted so as to have prevented the injury therefrom. It appears that the telephone wire ran along on Dr. Sawyer's house for some distance before entering the house, and the evidence tended to show that the force which killed Dr. Sawyer passed over this wire into the house without injury to the wire in that vicinity, and without injury to the house. There were no marks to indicate that lightning had entered the house, or that it had been in the immediate vicinity, except the marks on Dr. Sawyer's body and slight marks on the carpet, paper, and floor under the chair in which Dr. Sawyer was sitting at the time of his death. There was evidence tending to show that lightning, when upon a telephone wire, will go to earth on the first ground connection that it comes to; that when such lightning as entered Dr. Sawyer's house, and there killed him, gets upon a telephone wire, and passes over the wire without injury to the wire, it may be conducted to earth by known and approved appliances for that purpose, without injury to persons or property; and that, if the defendant's line at Dr. Sawyer's house had been protected by such appliances and had been properly grounded, the force which killed him would have gone to the earth over such ground connection, instead of jumping from the line and passing to earth through Dr. Sawyer's body. In this connection, and by this evidence, issues of fact for the consideration of the jury were presented. It was for them to find what force passed over the defendant's telephone line to Dr. Sawyer's house, and there killed him, and to find the extent of that force. When the jury had found what the force was and its extent, it was for them to say whether there were known and approved appliances for arresting, diverting, and controlling such force so as

to prevent injury, and whether the defendant was negligent in not providing such appliances, and whether the deceased came to his death by such neglect.

Upon the question of contributory negligence, the evidence was not so decisive one way or the other as not to leave a reasonable doubt or room for opposing inferences. As we have seen, the character of the business in which the defendant was engaged, and its undertaking to maintain an instrument in Dr. Sawyer's house for his use, were such that it was under a duty to exercise the care of a prudent man in like circumstances in selecting, placing and maintaining, in connection with its wires and instruments, such known and approved appliances and ground connections as were reasonably necessary to guard against accidents from lightning striking its telephone line and passing along its wires. The evidence tended to show that a telephone line, by the use of known and approved appliances, and by proper ground connections, may be so constructed that the telephone instruments will be comparatively safe; that there were no such appliances or connections at or near Dr. Sawyer's house that were intended, in their then condition, to guard against accidents from such lightning as the evidence tended to show killed Dr. Sawyer; that there was a plug with the instrument, which was intended to be inserted between the plates on the top of the instrument for the purpose of cutting the current of electricity out of the instrument; and that just before Dr. Sawyer was killed, his daughter placed this plug between the plates, but there was no ground connection, and the hole under the plates was too small to receive the plug, and, by reason of these defects, it did not serve the purpose for which it was intended. There was also evidence tending to show that the storm came on without much warning. One witness, at least, testified: "It seemed to come up sudden." Upon this evidence it was for the jury to say whether the deceased knew, or ought to have known, that the instrument was not provided with proper appliances and ground connection to guard against injurious effects from lightning when conducted to his house over the de-

fendant's telephone line; whether a prudent man, in like circumstances, would have assumed that the defendant had done its duty in these respects, and omitted to inquire or investigate for himself; whether the deceased knew, or ought to have known, that a storm was approaching; and whether he knew or ought to have known of any facts that would have warned a prudent man in like circumstances of approaching danger, and caused him to take measures for his safety by going to some other place, or doing something that was omitted by the deceased. The facts, circumstances and surroundings which the evidence tended to show were such that fair-minded men might reasonably draw different conclusions, and were such, when considered in the light of the common and extensive use of telephones, and the manner and place of using them, that a fair-minded man might reasonably say that the deceased, at the time he came to his death, was intently reading in his library, wholly unconscious of the danger to which he was exposed; and that in this he was doing as a prudent man, under like circumstances, would be very likely to do. The question of whether the deceased was in the exercise of due care was for the jury. Judgment affirmed.

NOTE.—In a note to this case in the Central Law Journal, the following cases of this series are collated as bearing upon the same general subject: *Giraudi v. Elec. Imp. Co.*, vol. 5, p. 318; *Perham v. Portland Elec. Co.*, ante, p. 487; *Ahern v. Oregon Teleph. Co.*, vol. 4, p. 349; *S. W. Teleph. Co. v. Robinson*, vol. 4, p. 342; *N. Y. &c. Teleph. Co. v. Bennett*, ante, p. 543; *Jackson v. Wisconsin Teleph. Co.*, vol. 5, p. 335; also, *Hand v. Telephone Supply Co.*, 1 Lack Leg. News, 351.

NATIONAL FIRE INSURANCE COMPANY ET AL. V. DENVER CONSOLIDATED ELECTRIC COMPANY ET AL.

Colorado Court of Appeals, Feb. 11, 1901.

FIRE CAUSED BY DEFECTIVE INSULATION.

An electric light company lighting a building under contract, is not responsible for injury by fire caused by defective wiring of the building by other contractors, unless it have knowledge of such defect.

Such knowledge is not to be imputed from the fact that a superintendent of construction of the company, not shown to be an officer or director or to have examined the wires, or to have been in the company's employ when the loss occurred,—casually saw the work as it was going on.

Evidence *held* insufficient to establish that a fire was caused by an electric current.

An electric lighting company is not responsible for the statement of a mere workman, sent to repair a fixture, that the same was safe, it not appearing that the workman was competent or authorized to advise, or that the person to whom the statement was made was authorized to make inquiry.

Appeal from judgment of District Court, Arapahoe County, in favor of defendant.

R. W. Barger, Platt Rogers, and Percy Wilson, for appellants.

I. N. Stevens and F. W. Lienau, for appellees.

BISSELL, P. J.: This is a case without a prototype. We have been cited to none at all similar, nor to any precedent which in our judgment even remotely tends to uphold the cause of action stated. This neither demonstrates nor tends to demonstrate that the plaintiffs have suffered no wrong, nor that they are without a remedy for that stated, but it leads the court to be somewhat critical in the examination of the positions which the appellants have assumed.

The suit was begun by some ten or a dozen insurance companies against the Denver Consolidated Electric Company to recover the amount which they had paid to the depot company for a loss. In March, 1894, fire broke out in the Union depot, and pretty nearly destroyed one end of the building, and the insurance companies were compelled to pay some \$60,000 for the loss. After paying it they brought this suit against the electric company for reimbursement. Disregarding any discussion of the query whether the insurance companies could maintain such a suit under any circumstances, even though the electric company had been responsible for the fire, we shall put the affirmance on the precise ground that they failed to make any proof or offer any evidence which tended, save most remotely, to establish the cause of the fire. The companies likewise failed to prove or offer to prove, or submit evidence which tended to prove, that the electric company was in any wise responsible for the loss. In other words, they wholly failed to produce any proof which would lay the responsibility for the fire on the electric company. The complaint stated several causes of action, but we shall dismiss the first two because no evidence was offered about them. These related to the careless and negligent manner of the wiring, the unsafe and dangerous character of the wire used, and charged that the fire was caused by this negligence. When it came to proof, however, there was nothing tending to show that the electric company had anything to do with the wiring or with the inspection of the wires, or that it made any contract or entered into any engagement to keep the wires in good repair and in a safe and proper condition. Evidence was offered to the effect that the building was wired in 1888 by the firm of Baxter & Spicer, of Philadelphia, under an employment by the Union Depot Company, and that the electric light company was not a party to the agreement, and did not execute it. What was done was done by the depot company at their own expense and on their own responsibility. The electric light company, under a contract with the depot company, connected their

system with the wiring, and delivered a current for use. This was the extent of the connection between the two companies, and it was simply a delivery of a current for lighting purposes by one, and the payment of an agreed price therefor by the other. Whatever, therefore, may have been the character of the wiring or the nature of the work, it was a matter with which the electric company was not chargeable. If it was negligently done, the negligence was the negligence of the depot company which put it in, or of the firm which that company hired, whose negligence would, of course, be the negligence of the depot company. There was a total absence of evidence which sustained or which tended to sustain any knowledge on the part of the electric light company of the character of this wiring. The only evidence which they presented on this subject was that of Stern, who testified that in 1888, when this wiring was put in by Baxter & Spicer, he was the superintendent of construction for one or more of the companies which by consolidation became the Denver Consolidated Electric Light Company; that casually, from time to time, he saw this work as it was done by Baxter & Spicer, —saw the nature of the wiring and the method of its attachment. He was not very precise or positive in regard to its character. In other words, at the time the wiring was put in he does not appear to have been particularly impressed with any negligence on the part of Baxter & Spicer, nor with the defective character of the wiring, or the unskillful method of its attachment. At all events, if he was so impressed he said nothing about it. There was no evidence that he stated what he saw to any of the officers or directors of the electric light company. So far as we can see, he was an employe occupying perhaps a controlling position with reference to other workmen in the service of the electric light company, being the superintendent of construction; but he was not an officer of that company, nor was he a director in the corporation. He never examined the building to determine whether the wiring was adequate, nor whether it was properly put in. His observation was simply casually

made as he went about the city looking after the construction of the plant of the electric light company, and the connections which were to be made with the various buildings in the process of construction. There was also a good deal of evidence offered, and some offered which was refused, tending to show that the wiring, at the time of the trial, at least, and possibly at the date when it was put in, inadequate and unsafe. It was what is known as "underwriter's wire," which the experts testified was not the best kind of wire to be used about a building of that sort, though it is entirely safe if perfectly insulated. There was evidence which tended to show that the wires were run through holes in the rafters, and then along laths or slats, and had more or less connection with the woodwork. There was testimony which tended to show that, after the wiring had been put in, the wires had been unduly loaded with lights, which, as the experts say, tends to concentrate the heat to the largest wire, and has a tendency to unduly increase the heat at given points, and, if at those points it strikes the wood, may char and ultimately cause a fire. We have not attempted to state all the evidence in this direction, but this is substantially the purport and tendency of the proof which was offered.

There is another basis on which the appellants attempt to rest their cause of action,—the circumstances of the fire. There was proof that in the evening, along about 11, a chandelier which was unlighted in the ladies' waiting room fell. The depot master immediately telephoned the electric light company to send a man down. For what purpose, and what sort of a person he wanted sent, the evidence does not disclose. There was nothing to show that he called for an electrical expert, or a man who was competent to determine whether the condition was a dangerous one. A man reported, presumably and ostensibly from the electric light company. He examined the chandelier, and went up into the upper story, and found the fuse had burned out which furnished the light in that section of the depot. He apparently made no extensive examination of the condition

of the wiring. He was not requested by the depot master to do otherwise than to ascertain the cause for the fall of the chandelier and the trouble with the lights, and to see that in this respect everything was rendered safe. When he came down stairs the depot master inquired of him whether there was any danger, and he replied "No," and stated that it would be difficult to make the repair that night, but he would come down in the morning and repair the wire and fix up the lights. With this statement the depot master was satisfied, the employe went away, and within less than an hour thereafter a fire broke out. We do not know, nor are we advised by the record, whether this was caused by the electric current. We do know that the insulated covering on the wire in one of the rooms was being consumed, to the observation of one of the employes of the railroad company, and we do know from the expert's testimony that this indicated that some fuse had failed to burn out, and that there was an undue current in that locality. Otherwise than by a sort of guess, there is nothing to show that the fire came from the electric current, although for the purposes of this decision, we are quite willing to assume that it did.

There are many reasons why this judgment in favor of the electric light company should be sustained. There was no competent evidence which established any responsibility on the part of the electric light company for the original wiring or for its inspection. The wiring was done by a concern with which the electric light company had no connection. The depot company hired them and paid for the work, and they, and they only, were responsible to the depot people for the character of what was done. Manifestly, under these circumstances, the electric light company cannot be holden for any defect either in the character of the material used, or in the negligent and unskillful performance of the work. To state the evidence and to state the situation is to dispose of this proposition. The only theory on which it is sought to hold the electric light company is that they had knowledge of the insufficient character of the wire and the

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defective construction, and, being advised of the dangerous character of the current which they were to supply, they were bound to advise the depot company about it, and had no right to make the connection and turn the current on without advising the depot company of the danger attending the use of electricity for lighting purposes, and especially about the danger of turning on the current where the wiring was of the sort and the work of the description which the proof disclosed. We do not think either proposition can be maintained, nor that there is anything in the case which justifies the application if defensible. In the first place, there is nothing which demonstrates that the electric light company had any knowledge either of the defective character of the wiring or of the negligent or unskillful construction. Stern's knowledge is not the knowledge of the electric light company, nor can any information which he acquired, in view of the way in which he acquired it, be imputed to that corporation. He was not the general agent of the corporation. He was an employe charged with certain duties, and, though those duties were of a supervisory nature, they in no sense made him the representative of the corporation, so that it would be charged with the knowledge which he casually acquired in going about the city. Since there was no connection between the Union Depot Company and the electric light company, and because the work was being done by an outside firm on employment by the depot corporation, we think it quite clear that the knowledge acquired by Stern was not knowledge brought home to the corporation. We do not need to discuss or consider what the rule is in those cases where knowledge has once been brought home to a corporation or to an agent of a corporation, and the event out of which their responsibility is supposed to grow occurs long subsequent to the acquisition of the knowledge. This is a matter which admits of discussion, but we are not required to express an opinion about it. It is always true that a principal is not bound by knowledge acquired by an agent unless that knowledge is present to the agent's mind at the time of the

transaction out of which the responsibility grows. We need only cite one authority to it. *Campbell v. Bank*, 22 Colo. 177, 43 Pac. 1007. This case is not directly in point, nor has our attention been called to one which seems to be entirely applicable. If Stern ever acquired any knowledge, it was entirely unofficial, and it was not at the time of a transaction between the Union Depot Company and his employers. So far as the evidence discloses, he never communicated the information to any of the officers or directors of the corporation. The fire happened years after the wiring was done, and years after the connection was made. It is not certain that Stern was in the employ of the electric light company when the fire occurred. To attempt to charge the electric light company with responsibility because of this casual knowledge, which was not communicated, and of which they were not advised when they made the connection and delivered the light, and of which they never had information, so far as the proof shows, would carry the doctrine of the responsibility of the principal because of the knowledge of his agent to a limit which is not recognized by any of the cases, and which is not justified by any legal principle. We do not assent to the position which the appellants take,—that the electric light company had no business to deliver the current without informing the depot company of the danger attending its use, and particularly of the danger attending its use where the wiring was defective or its construction unskillful and negligent. Where parties undertake to wire their own property, and then apply to a light company to deliver a current to light the building, they must be assumed to take all risks resulting from the character of the wire which is put in the building, and the method of construction which is adopted in putting it in. We do not believe that the principle contained in some cases to which our attention has been called, notably, *Lannen v. Gaslight Co.*, 44 N. Y. 459; *Farrant v. Barnes*, 2 C. B. (N. S.), 553; *Thomas v. Winchester*, 6 N. Y. 397; *Wellington v. Oil Co.*, 104 Mass. 64,—is at all applicable. In those cases, it will be observed, the injury

was done to an individual because of the undisclosed, dangerous character of the material sold, or the negligent conduct of an agent. They were not cases in which injury was done to property. Besides, the dangerous character of the article was not known, understood, or readily ascertainable by the individual to whom the stuff was furnished. This is, of course, true with reference to explosive oil, with reference to the nitric acid carbonyl, and with reference to the extract of belladonna. No such condition or circumstances attended the supply of the electric current. It is a matter of common knowledge, and in fact of universal knowledge, that an electric current is dangerous, and must be discreetly and prudently handled in order to avoid danger either to life or to property. We are quite ready to concede that, when an electric light company undertakes to supply a dangerous current to a dwelling house or to a building, they are bound to see that the wires they put in and the connections they make are properly insulated and protected, so that no harm will come to the property. Where, however, they are only employed to deliver the current by connection with wiring already made by the individual who owns the property, it seems to us that their responsibility ends when the connection is properly made under proper conditions, and they deliver the current in a manner which will protect both life and property. We do not believe any such responsibility rests on the company as to require them to advise the persons who apply for the connection that they must see to it that the wiring is of a certain class or description, that it is insulated in a particular manner, and that there is no connection between it and the woodwork, and, failing in this, that they will be liable for any damages which may happen because of the negligent or unskillful nature of the construction. When parties wire houses, they are supposed to have done it intelligently, and to have hired competent persons for the purpose, to whom alone they must look in case the work is improperly and unskillfully done.

There is still another reason why the appellants must fail.

They did not show that the electric light company was responsible for the conduct of the man who was sent there to look after the property at the time the chandelier fell. There is no proof that the depot master had any right to either inquire of the employe, or rely on his answer, in settling the question of the presence or absence of danger. The chandelier fell, and naturally put out some of the lights, and they telephoned for a man to come and attend to the matter. This he did, and when he went up to the locality of the accident he discovered that the fuse had burned out, which put out the light, and probably caused the destruction of the wire, which permitted the chandelier to fall, though the latter proposition is not clear. When he came down he was inquired of by the depot master whether there was any danger, to which he responded "No." There is nothing which demonstrates that he could bind the light company by this declaration. A workman sent to repair is not necessarily one who is competent to advise. It might be true the electric light company would be quite willing to be held responsible for the work done by the employe, or held responsible for his examination as to what ought to be done in an emergency of that description. This, however, in no manner establishes the fact that the company would be willing to be held responsible, or ought to be held responsible, for a statement that the general situation was such as to be free from danger. This would assume a knowledge on his part of the condition of the wiring all over the building, and would presume an examination of the general situation to enable him to answer that direct question, and so answer it that the depot company could rely on it, and in case of failure hold the electric light company responsible. We do not believe his agency or his relations to the company were sufficiently established to bind the company by his declarations. Even though this position be not well taken, it is true, on the evidence, that the condition was not such as to require that the current should be shut off when the employe went there. It is quite possible that his statement was absolutely true. It is

likewise possible that there may have been elsewhere in the building defective material or negligent construction which resulted in the fire. It is equally possible, and the contrary presumption may not be indulged in under the evidence, that the fire did not break out because of the accident, or of anything resulting from it, but because of the condition which had theretofore existed, and which culminated when the connection with the chandelier broke. The testimony of the experts is to the point that where the insulation is defective and the wiring is attached to woodwork, with an excess current, it may char and break out in fire. This may be precisely what happened. There is nothing which tends to prove that the fire was caused by the breakage which the employe was sent to investigate and repair. We think, however, the affirmance of the judgment can be very safely rested on the broad proposition that the electric light company had nothing to do with the furnishing of the wiring which was put into the building, or with its attachment to the structure, and, if any injury happened or a fire broke out because of defective wiring or negligent construction, it is a matter for which that corporation cannot be held responsible. The depot company hired an independent firm to put it in, and neither they nor anybody in privity with them can look to anybody except the contractors who did the work. We can discover nothing in the proof which would warrant us to disturb the judgment, which will accordingly be affirmed. Affirmed.

NOTE.—See note 2 at end of Part III.

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PETER ANDERSON V. INLAND TELEPHONE AND TELEGRAPH COMPANY.

Washington Supreme Court, July 1, 1898.

(19 Wash. 575.)

INJURY TO EMPLOYE BY SHOCK.

An insulator on a pole used in common by a street railway company and a telephone company broke, thus causing a span wire to come in contact with the charged trolley wire. An employe of the telephone company touched the span wire and received a fatal shock. It appeared that inspection was one of the duties of linemen; and he had with him apparatus for testing the wire. *Held*, that he had no right of recovery against his employer, the telephone company.

Cases of this series cited in opinion: *Flood v. W. U. Tel. Co.*, vol. 4, p. 402; *Dixon v. W. U. Tel. Co.*, vol. 6, p. 370.

Appeal by defendant from judgment of Superior Court, Spokane County.

Blake & Post, for appellant.

Wirt W. Saunders and *W. J. Thayer*, for respondent.

DUNBAR, J.: The respondent, a servant of the Inland Telephone & Telegraph Company, brought an action against the said telephone company and the Spokane Street Railway Company. The complaint alleges that, at the time the accident occurred, the plaintiff was a lineman in the employ of the Inland Telephone & Telegraph Company; that the two defendants used in common a pole located on the corner of Olive and Hamilton streets, in the city of Spokane; that the telephone company used said pole for holding up telephone wires, and the street railway company had fastened to said pole a span wire or guy wire, which ran to the pole from the trolley wire used by the street railway company; that the plaintiff ascended said pole for the purpose of stringing a wire on the pole, and, while on the pole, came in contact with the span wire belonging to the street railway company, touched the same, received an electric shock, and fell to the ground, breaking his leg as a result of said fall; that

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the wire which plaintiff touched, which belonged to the street railway company, was not designed or intended to carry electricity, but was used as a support for the trolley wire used by said street railway company, but, through the careless and negligent acts of the street railway company, said wire was at the time charged with a strong current of electricity, and was negligently left by the street railway company uninsulated, and in a dangerous and unsafe condition; that both of the defendants knew, and by the exercise of reasonable care might have known, and that plaintiff did not know, and by the exercise of reasonable care could not have known, the fact that said wire was charged with electricity. Upon the trial of the cause, by stipulation, the street railway was dismissed from the action, and a judgment was obtained against the appellant, the Inland Telephone & Telegraph Company. From this judgment this appeal is taken.

The contention of the respondent is that it is the duty of the master to furnish the employe with a safe place to work, and with safe and suitable machinery or appliances, and that this duty is a continuing one, which is imposed upon the master during employment. There is no doubt that this proposition of law is a correct one, and it may be stated as a corollary to the proposition enunciated above, that the law charges the master with knowledge which he ought to have had; and it is settled law that he ought to know that which by the exercise of reasonable care he would have discovered. Also, it may be accepted as universally conceded law that the responsibility of the master cannot be transferred to another, and that when a duty is imposed upon him, and another is employed by him to perform that duty, the negligence of the agent will be imputed to the master. But this case must be considered with reference to another universally accepted proposition, viz., that, when a servant enters into an employment which is necessarily hazardous, he will be presumed to have assumed all the ordinary risks incident to such service; and the fact that the service is necessarily

a dangerous one does not increase the master's liability if the injury resulted from the natural and ordinary incidents of the undertaking, presuming, of course, that the servant is a person of mature years and common understanding. The trouble in this case is not so much to determine what the law is in regard to the duties of master and servant as it is to apply the group of circumstances in the case to the law. It is the insistence of the appellant that, under the circumstances of this case, there was no duty resting upon the master to inspect the insulator which was the cause of the current flowing from the trolley wire to the span wire. It may be stated here that the insulator, which was a porcelain one, broke, by reason of which the guy wire came in contact with the charged wire of the railway company, and this guy wire, being attached to the post which the respondent was climbing, was the wire with which he came in contact. We have examined with particular care both the record in this case, and the cases cited by respondent and appellant, and all other authority bearing upon the case which we have been able to find, but have not been able to find a case exactly in point, it being conceded by the authorities generally that the proper application of well-known principles governing the responsibilities of masters depends largely upon the circumstances of each case. But, from such an investigation as we have been able to make, we are forced to the conclusion that no absolute duty rested upon the master in this case to prevent the charging of this guy wire, or, in other words, to preserve inviolable the insulators, so far as the safety of the respondent is concerned. The respondent here was a lineman, and had been in the employ of the company for something over two years, working first as a ground man, and for two years or more had been working as a lineman.

It is contended by the respondent that the question of whether or not the respondent was an inspector is a question of fact, upon which the testimony is conflicting, and that, therefore, the verdict of the jury upon that proposition is binding upon the court.

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We think, in any event, the judgment would have to be reversed by reason of the instructions given by the court; but, with the view that we take of the master's liability under the undisputed testimony, it will not be necessary to notice these errors. It is true that the respondent testified that he was not an inspector, and that he also testified, notwithstanding the fact that he had alleged in his complaint that he was a lineman, that he was not a lineman; but the testimony was evidently with reference to a definition or a statement of the lineman's duty as given by Mr. Hopkins, the superintendent of the telephone company, and the later testimony, not only of the appellant, but of the respondent and his witnesses, shows conclusively, it seems to us, that, while not nominally an inspector, the duties of a lineman embraced the duties of an inspector. Corporations of this kind act through employees. Necessarily, they cannot act in any other way. An inspection of their lines and posts and insulators must be made by the employees. In this case it is an admitted fact that there was no regular inspector and no inspectors other than the linemen. It is true that some of the railroad cases cited by the respondent decided that it was the duty of the company under certain circumstances to have inspectors, but we think none of those cases are in point here. In this case the respondent and the other linemen testified that they knew that the line or wire which occupied the insulator jointly with the wire with which respondent came in contact was charged with electricity. The respondent testified that he knew the power of electricity, and the danger that would be incurred by coming in contact with a live wire; that he knew that, if the insulator broke, the result would be that the wire which he touched would be charged; and he knew also that porcelain insulators frequently did break. It seems to us that this brings him within the rule which we have announced above,—that when he accepted the employment, that was necessarily hazardous, he assumed this risk, which, under all the testimony, was an ordinary risk, and that he did not exercise the discretion which he ought to have exercised in test-

ing this wire. The testimony shows that, shortly after the accident, one of the appellant's witnesses, Mr Dart, observed the insulator, and separated it from the wires, and it was made an exhibit in court. He also testified that the insulator when it was exhibited was in the same condition that it was immediately after the accident, when he first discovered it. About one-half of the insulator was gone, and there was some contention developed in the trial as to whether the broken part of the insulator was towards the post which respondent climbed; and it was conceded this might have been detected by a lineman who was accustomed to looking at such things, if the broken part of the insulator had been next to the post. We think, and such was the opinion of the lower court who heard the testimony, that it is demonstrated that it was a physical impossibility for the broken part of this insulator to have been in the opposite direction from the post without making a complete insulation. This, therefore, must be considered an established fact in the case. The respondent says that he glanced at the insulator when he went to ascend the post, but did not give it any particular attention, and did not make any test. The testimony of the other linemen was—and it is not controverted—that linemen carried apparatus by which they could test insulators, and that they understood that they had to look out for themselves as far as danger was concerned. It appears from the testimony that the respondent must have known that no other inspector was kept by the company, and, even if there had been, it is impracticable for an inspector to make tests that would protect workmen at all times. An inspector cannot be maintained at every insulator. An insulator might be tested and found sound at one hour of the day, and the next hour it might be broken, so that it would not insulate the wires, and the only way in which workmen could be protected would be to make these tests themselves; and it was testified in this case by the respondent that it would only have required a moment's time. While there is no gainsaying the rule that under ordinary circumstances the

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employe has the right to rely upon the fact that the master will furnish him a safe place to work and safe appliances, yet the law does not intend that this shall be a blind and unreasonable reliance, but that reasonable men shall exercise in a reasonable manner the faculties of which they are possessed. It seems to us it would only have been such reasonable exercise of prudence upon the part of the respondent in this case to have tested this wire before he touched it.

While there has been possibly some conflict in authority over cases which, in principle, were something like the case at bar, we think the great weight of authority sustains the view which we have taken. The first case cited by appellant—*Flood v. Western Union Telegraph Co.*, 131 N. Y. 603, 30 N. E. 196—was an action for the death of the servant while working as lineman on the telegraph pole, caused by leaning his weight on one of the cross-arms, so that it broke, causing him to fall. The court there decided that the defendant's inspectors (and it seems conceded in that case that they had inspectors) were not required to climb each pole, and examine the arms; and the deceased knew this, having been employed by defendant for several years, part of the time as inspector, and the rest of the time as a lineman. The Court, among other things, said: "The linemen all discharge their duties in the daytime. They have frequent occasion to climb the poles, and work about the arms, and obviously they are the persons who are expected to see the condition of the arms, and, if they find them insufficient, to replace them, or to report the fact." And so in this case it was the linemen, and the linemen only, who were in the habit of climbing these poles; and under the undisputed testimony, there being no one else to inspect them, it was the duty of the linemen, before taking hold of the wire which might become dangerously charged with electricity, to test the same. So well understood are the general duties of a lineman, and the opportunities which he has for examining the poles and the instruments with which he works, that it was held in *McGorty v.*

Southern New England Telephone Co., 69 Conn. 635, 38 Atl. 359, 6 Am. St. Rep. 62, that a lineman in the employ of the telephone company could not recover for an injury caused by the fall of a pole upon which he was at work, notwithstanding a prior statement by the foreman that he had been up the pole, and that it was safe, where plaintiff knew that it was the rule and custom for each lineman to test the pole for himself, and that suitable appliances were at hand for making such test, and for securing the pole in case the lineman doubted its safety. It seems to us that the circumstances of this case are parallel with the circumstances surrounding the case at bar, although there is an attempt by respondent in his brief to distinguish them. It was true that the trial court found in that case "that it was the rule and custom, in this branch of the work, that 'each lineman should look out for his own safety in climbing poles;'" but the undisputed testimony in this case is to the same effect. *Bergin v. Telephone Co.*, 74 Conn. 54, 38 Atl. 888, was a case where a telephone company used the same pole for their wires; and the court held that the law did not absolutely require the telephone company, as between it and its linemen, to inspect and test guy wires and circuit breakers put in by such railroad company, to discover whether they were in a safe condition, but whether the employer or employe should discharge such duty depended on the circumstances of the particular case. In commenting on the testimony in that case, the Court said: "Linemen are employed by the telephone company, among other things, for the purpose of doing work which is dangerous, by reason of the possible contact of the telephone wires with highly-charged wires of the street-railway or other companies. The linemen are to do their own testing in such work. The telephone company has no other men than the linemen to do the testing, as the linemen knew; and there was nothing to prevent Delaney [who was the plaintiff in the case] from testing the guy wire, and the linemen on this job were furnished with all the tools, appliances, and wires with which to test wires of the electric

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street-railway company." This case seems to us in principle to be almost parallel with the case at bar. It is insisted by the respondent that the first case cited (*Flood v. Telegraph Co., supra*) is inconsistent with the previous case in the same court (viz., *Bushby v. New York, L. E. & W. R. R. Co.*, 107 N. Y. 374, 1 Am. St. Rep. 844, 14 N. E. 407), in which it was held that the defendant was liable to a brakeman on account of a wooden stake breaking because of a latent defect. We think the circumstances of this latter case were altogether different, and it was evidently considered by the court deciding the case of *Flood v. Telegraph Co., supra*, that no inconsistent principles were applied in the two cases, for the former case is not overruled or mentioned in the latter opinion. *Dixon v. Western Union Telegraph Co.*, 68 Fed. 630, was a case where the plaintiff was an employe of the telegraph company, and, when engaged with others in stringing wires on its poles, was instructed to climb a pole belonging to another company, to get certain wires out of the way. While descending, after performing the work, he fell, in consequence of one of the spikes being insufficiently secured. It was held that the danger from which the accident resulted was one of the risks of plaintiff's employment, which was assumed by him, and for which his employer was not liable. That case, however, is not as strong a case in favor of the master as the case at bar, for there the plaintiff was directed by the foreman, who was at the time acting for the defendant. The Court laid down the rule in that case as follows: "The employer is not an insurer of the safety and sufficiency of the tools, machinery, or appliances furnished to the employe for his use, nor is he a guarantor of the safety of the place where or upon or about which the employe is required to work. The duty cast by law upon the employer is to use ordinary and reasonable care to furnish safe and sufficient tools, machinery, and working places. If he has done this, he has performed the full measure of his duty. The employe, in order to recover for defects in the appliances or working places of the business, must

allege and prove that the appliance was defective, or the working place insecure; that the employer had notice or knowledge thereof, or that, by the exercise of ordinary and reasonable care, he might have had notice or knowledge; and that the employe did not know of the defect, and had not equal means of knowing with the employer." The last sentence in this proposition must be given as much force as the preceding ones; for if the employe does know of the defect, or has equal means of knowing with the employer, then, certainly, it is his unquestioned duty to investigate before proceeding. In *Griffin v. Ohio & M. Ry. Co.*, 124 Ind. 326, 24 N. E. 888, the rule was announced that, "where the danger is alike open to the observation of all, both master and servant are upon an equality, and the master is not liable for an injury resulting from the dangers of the business." In this case, certainly, the danger was not only as open to the observation of the respondent as it was to the master, but the undisputed testimony shows that the master obtained his knowledge of the danger through the respondent and his fellow servant. In *Larsson v. McClure*, 95 Wis. 533, 70 N. W. 662, it was held that, "When the danger is alike open to the observation of all, both the master and the servant are upon an equality, and the master is not liable for an injury resulting from the dangers incident to the employment." In *Bedford Belt Ry. Co. v. Brown* (Ind. Sup.), 142 Ind. 569, 42 N. E. 359, the Court said: "Every service has its own peculiar hazards, and the law does not hold the master accountable for such hazards as ordinarily and naturally belong to any service,"— and quoted approvingly *Day v. Cleveland, etc., Railway Co.*, 137 Ind. 206, 36 N. E. 854, where it was said: "In a case where the servant is one of mature age and experience, as in this case, the law never imposes the duty on the master of becoming eyes and ears for his servant, where there is nothing to prevent the servant from using his own eyes and ears to avoid danger. . . . The law requires that men shall use the senses with which nature has endowed them; and, when without excuse one fails to do

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so, he alone must suffer the consequences, and he is not excused where he fails to discover the danger if he made no attempt to employ the faculties nature has given him." The rule is thus announced in Wood, Master & Servant, sec. 328: "When a servant is employed upon work which, equally within the knowledge of the master and the servant, is of a dangerous nature, the master is not liable for the consequences of an accident occurring to the servant in the course of that employment, unless there be negligence on the part of the master, and the absence of rashness on the part of the servant. A servant is bound to exercise his own skill and judgment, so as to protect himself in the course of his employment, and the master is not regarded as warranting, generally, his safety. He is himself bound to exercise proper care, and cannot claim indemnity from the master for an injury resulting to him which might have been prevented if he had himself been reasonably vigilant." Substantially the same principle is announced in section 366, viz.: "A master is not liable for injuries to his servant while using machinery in the employment, if the servant has the same knowledge of its defects, or the danger incident to its use, as the master, or if, in the exercise of due care, he ought to have such knowledge, and, at or before the time the accident occurred, there was nothing to indicate any danger such as demanded or suggested precautions which were omitted by the master." In this case it was equally within the knowledge of the master and the servant that this was a dangerous employment, and it cannot be said that there was negligence on the part of the master, and absence of rashness on the part of the servant, or that the servant used his skill, to protect himself in the course of his employment. He had sufficient skill, according to the undisputed testimony, to protect himself, and he had the apparatus at hand for testing the insulator and the wires. "If the servant is to recover damages," says Mr. Beach, in his work on Contributory Negligence (sec. 299), "he, like any other plaintiff, comes into court under the legal obligation of showing, or having it sufficiently

appear, that his own negligence has contributed in no legal sense to the injury." And in section 346 of the same work it is said: "Knowledge on the part of the employer, and ignorance on the part of the employe, are of the essence of the action; or, in other words, the master must be at fault and know of it, and the servant must be free from fault and ignorant of his master's fault, if the action is to lie. The authorities all state the rule with these qualifications." There is a wilderness of authority to the same effect, but it would serve no good purpose to reproduce it here. We have examined with patience the authorities cited by the respondent, and, except in one or two cases, notably cases with reference to damages arising from the falling of posts, which we think are in conflict with the cases cited on that subject by the appellant and noticed above, they are not in point. In all of them it appeared that the injury was caused by defects or dangers which were not apparent to the servant, or which would not have been apparent to him if he had exercised ordinary care,—such care as was consistent with the dangers incident to the employment. The citation from 7 Am. & Eng. Enc. Law, p. 830, to the effect that "it is the duty of a master, not only in the first instance to make reasonable efforts to supply his employes safe and suitable machinery, tools, etc., but also thereafter to make like efforts to keep such machinery, etc., in safe and serviceable condition, and to that end he must make all needed inspections and examinations," and 2 Bailey, Master & Servant, secs. 2619, 2620, to the same effect, are, of course, accepted as the law; but we do not think that acceptance will avail the respondent in this case, for the reason, as we before intimated, that these tests were made through the linemen for this company. The same rule is announced in *Comben v. Stone Co.*, 59 N. J. Law, 226, 36 Atl. 473, cited by appellant, where it is announced that the rule is subject to the qualification that the servant is without knowledge of the danger, and cannot observe and acquire the knowledge in the exercise of ordinary care in the employment. This qualification of the rule runs through all the cases.

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The respondent alleges in his complaint that the plaintiff did not know, and by the exercise of reasonable care could not have known, the fact that said wire was charged with electricity. By this allegation he recognized the principle of law which we have just enunciated, and it was necessary for him to make this fact appear. We think, from an investigation of the whole case, that it appears from undisputed testimony that plaintiff did not exercise reasonable care in the investigation of the dangers which he knew were incident to his employment, and that had he exercised such care, and made the tests which reasonable prudence would have dictated, he would have had knowledge of the danger which beset him. The accident was unfortunate, and the result most lamentable; but, with our view of the law governing the case, the judgment must be reversed, and the cause is remanded to the lower court, with instructions to dismiss the same.

SCOTT, C. J., and GORDON, REAVIS and ANDERS, JJ., concur.

NOTE.—See note 2 at end of Part III.

THOMAS H. EPPERSON V. POSTAL TELEGRAPH CABLE COMPANY.

Missouri Supreme Court, March 21, 1899.

(155 Mo. 346.)

INJURY TO EMPLOYEE BY SHOCK.

An experienced lineman felt a current of electricity in a wire and informed the foreman of his squad of its dangerous condition. The foreman thereupon felt of the wire and pronounced it safe. Plaintiff took hold of the wire again, and again felt the current, but said no more to the foreman and kept at work until he received a severe shock and injury. *Held*, that he had no right to rely on the foreman's assurance.

It appearing to be as probable that the injury was caused by lightning as that it was caused by the induction of currents in the wire, for

which defendant, the employer, would be responsible, *held*, that plaintiff could not recover.

Case of this series cited in opinion: *Junior v. Missouri Elec. Light & Power Co.*, vol. 5, p. 389.

Appeal by defendant from judgment of Circuit Court, Jackson County.

Gage, Ladd & Small, for appellant.

Wash Adams and *N. F. Heitman*, for respondent.

SHEERWOOD, J.: Action for ten thousand dollars damages for injuries received while acting as lineman for defendant corporation, and through alleged negligence of defendant. The cause was tried on the first count in plaintiff's petition, which is near seven printed pages in length, and, in substance, the following: That defendant, a corporation, was proprietor of, operating and constructing a line of telegraph from Chicago, Illinois, to Indianapolis, Indiana; that such line was operated by means of wires stretched on poles, and a large gang of men was employed for the purpose of constructing such line, plaintiff being one of the number, and his duty being to climb poles and stretch wires; that Terwilliger was in charge of the gang of men, acting as foreman; that when within a few miles of Indianapolis, and on the 28th of September, 1891, the foreman negligently and carelessly commanded plaintiff to take the wires so being stretched, ascend the pole, and attach the wire to the pole, on which were other wires stretched; that the foreman knew, at the time of giving such command, or by the exercise of ordinary care might have known, that the wire plaintiff was ordered to ascend the pole with was in a dangerous condition by being charged with a dangerous intermittent current of electricity; that the carrying of such wire up the pole and attaching it, etc., would greatly imperil the life or limbs of plaintiff; that the wire thus being strung by the gang employed for the purpose was, and ought to be, a dead wire, without any current

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of electricity in it, and was expected by the members of such gang to be in that condition; that on the date aforesaid plaintiff observed an unexpected current of electricity in said wire, the existence of which in said wire was contrary to the ordinary course of plaintiff's employment of stringing a new wire through the country, and the risk arising from the existence of such current of electricity in said wire was a risk not ordinarily incident to the employment in which plaintiff was engaged in the stringing of such wire; that on one occasion, on the morning of the day mentioned, plaintiff observed the unexpected current of electricity in said wire, and, notifying the foreman of it, was told by him that if he noticed the existence of the current again he should notify him about it, and the latter would take steps to find out what the trouble was; that on the same morning, having again noticed the current of electricity in the wire, he again notified the foreman of that fact; that the foreman negligently failed to ascertain the cause of the existence of the current in the wire, and to protect plaintiff against such unusual danger; that just before plaintiff started up said pole, having handled the wire all day, only feeling the current of electricity at intervals, he again noticed that the current of electricity was in said wire, and complained to the foreman that "said wire was too strongly charged with electricity to be handled with satisfaction;" that thereupon the foreman picked up the wire, held it in his hands, said he felt nothing in it, and thereupon negligently and carelessly assured plaintiff the wire was all right, and ordered plaintiff to go ahead with his work; that plaintiff, relying on this statement of the foreman, and being lulled into a sense of security thereby, went up said pole in obedience to said order; that, after being notified of the intermittent current of electricity in said wire, it became the foreman's duty to investigate, and find out the cause of such wire being charged with electricity, etc.; that the foreman did not perform such duty in a careful manner, but negligently failed to do so, after being notified, etc.; that it was also the duty of the foreman to remove

the cause of the existence of such current of electricity in said wire, which he could have done by cutting the wire behind the places where plaintiff and other climbers were at work; that this duty, also, defendant negligently failed to perform; that pursuant to the order aforesaid, negligently given, plaintiff, with the wire in his belt, mounted the pole; that when about 30 feet above the ground, while endeavoring to fasten the wire, by means of other wires, to the cross timbers on the pole, he received a shock of electricity from said wire; that it robbed plaintiff of consciousness, and caused him to fall heavily to the ground, etc., to his damage, etc.; and that this result was produced by the negligence of defendant, as aforesaid. It will be noticed that there is no charge in the count in question that defendant was guilty of any negligence in constructing its line, or that there was any defect in any portion of defendant's electrical apparatus; nor that the electricity by which plaintiff was shocked got into the wires through any negligence of defendant. The only negligence charged consists in the statement that Terwilliger, defendant's foreman, was guilty of negligence in ordering plaintiff to ascend the pole, and proceed with his work, stringing the wires, when knowing, or negligently failing to know, that they were occasionally charged with an intermittent current of electricity, which was dangerous; and that Terwilliger negligently failed to remove the cause of the existence of the current of electricity in the wire by cutting the wires behind the workmen then engaged in stringing the same.

[A very large part of the opinion is taken up with a statement of the testimony of witnesses with respect to the facts in the case and the dangers of crossed wires; also with a discussion with illustrations from many reported cases, of the law of assumption of risks of dangerous employment. All this is here omitted, and only the conclusion of the prevailing opinion given, as follows:]

A case nearly approaching the present one in some of its features is that of *Junior v. Power Co.*, 5 Am. Electl. Cas. 364,

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127 Mo. 79. In that case it is said, in the opinion delivered per GRANT, P. J.: "The negligence of which plaintiff complains here is the failure of defendant's foreman, in charge of the squad of men who were to make the connection of defendant's electric plant with the butcher shop on the Manchester road, to caution plaintiff's husband in regard to the exposed condition of the ends of these two wires. The evidence shows beyond cavil that the plaintiff's husband was an experienced lineman; that he had worked for defendant in this capacity for several years; that he had also worked for other electric companies. The evidence shows that deceased ascended the pole alone that day to make the connection; that it was broad daylight; that two 'live wires' of the defendant were devoid of insulating material at their extreme ends for the space of one-eighth or one-sixteenth of an inch, and that deceased sat upon a cross-arm of the pole, preparing to connect a wire for the butcher shop with these ends; that the fact that these two ends of the wires were not insulated was open and obvious, and could not only be seen by one in the close proximity thereto of the deceased at that time, but both Baldwin and Baurman testify that they saw the two exposed ends from their position on the ground, thirty feet distant. Baldwin was a brother-in-law of the deceased. It appeared that deceased was an experienced lineman, understood his business, and that the linemen were the only employes of defendant who went on the poles and handled, connected, and repaired the wires thereon, and the only employes who had an opportunity to inspect and know the condition of the wires. The testimony of the brother-in-law, the foreman of the squad, was that he did not caution the deceased that the ends of the wires were exposed that day because it was not only open and obvious, but was the peculiar business of deceased to see and know that, and the connection was to be made with these wires. . . . There were six arms on the pole upon which he had climbed, on which were strung the wires of the telephone and

telegraph companies and of the fire-alarm service, all charged with electricity and all uninsulated. . . . The facts of this case bring it within the familiar principle that if a servant, capable of contracting for himself, and with full notice of the risk he may run, voluntarily undertakes a hazardous employment, or to place himself in a hazardous position, or to work with defective tools or appliances, the master is not liable for injuries received from these known risks. It often happens that both natural and artificial persons are engaged in exceedingly dangerous business, and, if it is not unlawful, may employ servants to perform dangerous duties, and yet not be liable to its servants for injuries received therein, if the servants are capable of contracting, and know the risks attending the business. The handling of live wires is a most dangerous business, but plaintiff's husband knew that when he entered into the employment. He was not a minor, nor an inexperienced workman, to whom the dangers of the business were unknown. The danger to which he was exposed was open and obvious. He was as cognizant of the danger, if not more so, than the foreman, and the failure to caution him cannot avail where he is as well acquainted with the hazard as his employer." See, also, *Steinhauser v. Spraul*, 127 Mo. 541.

These authorities, and the principles they declare, when applied to the facts of the case at bar, only conduces to but one result, and that result unfavorable to plaintiffs. He, too, was an experienced lineman, and could not help being apprised of the dangers of the situation, either from experience gleaned in another field, or from his present and more recent labors. There seems to be no doubt that he was more experienced than Terwilliger, the foreman; but, under the rule heretofore quoted, if his knowledge only equalled that of the foreman, then plaintiff took his own risk. Besides, all that the foreman assured him was as to an existing state of facts. There was no assurance of the future. Indeed, the petition itself states: "Said foreman . . . thereupon told the plaintiff that he did not feel any-

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thing in the wire at that time." . . . And it is impossible to suppose that the plaintiff could have relied on what the foreman said, because he felt the current again before he took the wires out of his belt, and therefore knew that the current had reappeared. Yet, notwithstanding this, he took the wires out of his belt, and, disregarding all the ordinary dictates of former experience and present prudence, he proceeded to tie the wires, and received the injury complained of. In such circumstances, being fully apprised of the danger himself, he will not be permitted to say that he relied on the previous assurances of the foreman.

Moreover, the evidence does not show what it was that caused the current of the electricity to be on the wire—whether it resulted because of the wires being strung where crossed with others, or whether from lightning. Much of the testimony tended to show that it was the latter, and there was no dispute that all the conditions were favorable to the theory that it was lightning that caused the injury. In such circumstances we are confronted by the rule which declares that, where an action is brought for damages which are occasioned by one of two causes, for one of which defendant is responsible and for the other not, the plaintiff is fated to failure if his evidence fails to show that the damages were produced by the former, or if, from the evidence, the probabilities are equally strong that the damages were caused by the one as by the other. *Searles v. Railway Co.*, 101 N. Y. 661. This principle finds recognition in *Priest v. Nichols*, 116 Mass. 401; *Smith v. Bank*, 99 Mass. 605; *Breen v. Cooperage Co.*, 50 Mo. App. 202; *Marble v. City of Worcester*, 4 Gray, 395; *Fuchs v. City of St. Louis*, 133 Mo. loc. cit. 196, 197. This action being for negligence, the affirmative is on plaintiff to establish it. In the language of the Supreme Court of Wisconsin: "Judicial determinations must rest upon facts, and legal liability must be determined by the law in application to the facts. These rules will not exclude circumstantial evidence, for such evidence is often the strongest; but such evi-

dence, after all, must establish facts. When liability depends upon carelessness or fault of a person or his agents, the right of recovery depends upon the same being clearly shown by competent evidence; and it is incumbent upon such a plaintiff to furnish such evidence to show how and why the accident occurred—some fact or facts by which it can be determined by the jury, and not left entirely to conjecture, guess, or random judgment, upon mere supposition, without a single known fact." *Sorenson v. Pulp Co.*, 56 Wis. 338. For these reasons it must be held that defendant's demurrer to the evidence was well taken, that the facts in the record establish no cause of action, and that the judgment should be reversed.

JAMES MORAN V. CORLISS STEAM ENGINE COMPANY.

Rhode Island Supreme Court, July 8, 1899.

(21 R. I. 386.)

SHOCK INJURING EMPLOYE—EVIDENCE—DELEGATION OF DUTY.

A master using machinery operated by electricity is bound to exercise a very high degree of care for the protection of employees. Circumstances held sufficient to advise defendant of danger from insufficient insulation, and to hold him liable for injuries due to its failure to avert the danger.

Evidence of shocks subsequently received from the same machine, *held* competent as tending to show the condition as to insulation at the time of the injury.

The delegation of the master's duty to supply reasonably safe appliances to his servant, to another, though an independent contractor, will not relieve the master from liability.

Appeal by defendant from judgment on verdict for plaintiff.

David S. Baker and *Dennis H. Sheahan*, for plaintiff.

Henry W. Hayes, for defendant.

MATTESON, C. J.: We think that the testimony shows that the crane at which the accident occurred was defectively constructed, either in that there was a metallic connection between the hauling chain and the motor, or at least that the insulation between them was not sufficient to prevent a leakage of electricity from the motor to the hauling chain, and that, though the leakage of electricity from the motor to the lifting chain and hauling chain was probably insufficient to be dangerous with no greater current than that designed to be used to operate the crane, yet it was liable to become dangerous from the presence of a more powerful current. The testimony shows that at the time of the accident, February 6th, 1896, at a little after 5 o'clock in the afternoon, the wind was blowing at the rate of 40 miles an hour, with puffs at the rate of 60 miles—conditions favorable to the intermittent crossing or contact of electric wires. We think the jury would have been warranted in finding that the accident was due to the contact, outside of the defendant's premises, between the wire supplying electricity to the motor of the crane and some more heavily charged wire, whereby, by reason of defective insulation, possibly occasioned by the rubbing together of the wires, a current much exceeding the usual current was transmitted over the wire to the motor of the crane, and thence, by reason of the faulty construction of the crane, to the hauling chain. In so far, therefore, as the petition rests on the ground that the verdict is against the evidence, the question resolves itself into this: Was the defendant reasonably bound to have anticipated the influx to its premises of a current of electricity sufficiently powerful to dangerously charge the metallic portions of its crane, and did it take reasonable precautions for the protection of its servants employed in the handling of the crane? In view of the subtle and dangerous nature of electricity, the defendant, making use of it, was bound to the exercise of a very high degree of care for the protection of its employes against injury from such use. The accidental crossing or contact of wires, caused by their sagging or breaking,

or by high winds and other causes, and the consequent charging of the wire carrying a light current with a dangerous current from a more heavily charged wire, is, in our opinion, of sufficiently frequent occurrence to have suggested to the defendant the liability to accident from that cause, and to have required it to take precautions against injury to its employes thereby. The testimony shows that light shocks had been received from time to time by the men from the lifting chain, and the defendant had supplied rubber gloves to be used by the pourers on that account. These shocks were notice to the defendant of the leakage of electricity from the motor to the chain, and were also notice that if, from any cause, a sufficient current of electricity was brought to the motor, the leakage might be sufficient not only to charge the lifting chain, but also the hauling chain, or other metallic portions of the crane, unless properly insulated, with a dangerous current. Having this notice, we think the defendant was bound to have made the insulation between the motor and the hauling chain so complete that the use of the hauling chain would have involved no risk of injury by electricity. Our opinion is, therefore, that the verdict was not against the evidence on the issue of defendant's negligence.

The testimony with reference to shocks received by Houghton and Mahoney, subsequent to that received by the plaintiff, to which exception was taken, was, we think, admissible, as tending to show the condition of the chain, as to insulation, at the time of the accident.

The defendant also took the point that as at the time of the accident to the plaintiff, the cranes were, as it contends, in the possession of the General Electric Company, an independent contractor, and were not delivered to it until some time in March, 1896, the defendant, not having control of the cranes, was not responsible. The court refused to so charge, and the defendant excepted. We think the request was properly refused. The master owes to servants the duty of supplying reasonably safe appliances for them to do the work required of

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them; and the delegation of this duty to another, though an independent contractor, will not relieve the master from liability for an injury to a servant resulting from a neglect of the duty. *Trainor v. Phila. & R. Railway Co.*, 137 Pa. St. 148; 2 Bailey, Pers. Inj. secs. 2561, 2571. Petition for new trial denied, and case remanded to the Common Pleas Division, with direction to enter judgment on the verdict.

NOTE.—See note 2 after next case.

JOHN N. CARR V. MANCHESTER ELECTRIC COMPANY AND UNION
ELECTRIC COMPANY.

New Hampshire Supreme Court, July 27, 1900.

SHOCK INJURING EMPLOYE—CONTRIBUTORY NEGLIGENCE.

Plaintiff, for twenty years a lineman in the employ of an electric light company, and instructed as to his duties, and told that the first thing to do in trimming was to throw a switch to cut the lamp out of the circuit, so as to avoid danger from contact with live wires, while attempting, in a wet morning, to reach the switch, received a shock from a wire which had become alive by contact with his employer's wire and a wire of another electric company.

In an action against both companies, *held*, as to the employer company, first, that it was not chargeable with negligence in failing to inform plaintiff that there was greater danger in wet than in dry weather, it not appearing that dampness caused or contributed to the shock; second, that the employer had performed his full duty in providing the switch and instructing plaintiff in its use; third, that the danger of shock due to crossed wires was a known risk of plaintiff's employment. As to the other company, by whom plaintiff was not employed, *held*, that plaintiff was chargeable with only ordinary care, and that the question whether or not he was exercising such care in reaching for the switch was properly submitted to the jury.

Exceptions from Hillsboro County to orders overruling motions for non-suit, direction of verdict, and to set aside the ver-

dict, defendants bring exceptions. Judgment for the Manchester Electric Company and against the Union Electric Company.

Case to recover damages for an injury received by the plaintiff November 24, 1896, on Marion street, in West Manchester, while in the employ of the Manchester Electric Company as a lamp trimmer. The evidence for the plaintiff tended to show that at the time of his injury he had been in their employ since October, 1894, as a trimmer, except the summer of 1895; that his work required him to go over the circuit in the morning to trim the lamps, and again at night, to see that they were properly started; that his circuit included about 100 lamps; that he had trimmed on it for the preceding year; that when he first entered the company's employ he was fully shown how to trim a lamp, and was told that the first thing to do in trimming was to reach up to the top of the lamp and throw a switch to cut the lamp out of the circuit, so as to avoid the danger from the wires of the circuit upon which he was at work coming in contact with live wires; that he was entirely competent to trim lamps, and fully understood the use and purpose of the switch; that when he entered upon his employment he was instructed in the details of his work, and shown how to do everything connected with it, but received no further instructions thereafter; that early in the morning of the day of the accident it had rained somewhat, and that the day was cold and damp; that at the place of the accident he climbed the pole (which was something over 20 feet in height) upon which the lamp was fixed, and, while reaching for the switch, in some way received an electric shock which caused his injury; that the live wire was caused by the wire of his employer coming in contact with a transformer of the other defendants; that this contact was on another street, was unknown to the plaintiff, and was caused by the joint negligence of both defendants in constructing and maintaining their lines of wire; that it is more dangerous, when there are live wires, to work upon pole lamps in wet weather than in dry—there being no evidence that the plaintiff was ever instructed as to this danger,

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or that he knew of it, unless such knowledge is to be inferred from his employment. There was no evidence that the lamp of his employers was defective or out of repair at the time of the accident, or that there was any defect in the pole on which it was placed. About three feet below the lamp was a wooden arm three inches thick. Five or six months before the accident, this cross arm had been lowered. At first it was within two or three inches of the top of the pole. Before it was changed the plaintiff used to sit on the arm to do his work. After it was changed he stood on it, and had been in the habit of doing so three or four months prior to the accident. There was nothing about the cross arm that he did not perfectly understand. The plaintiff's duty as trimmer consisted in cleaning the rods of the lamps, putting in new carbons, and dusting the globes. When the lamp was on top of the pole, he climbed up to it. When it was on a mast arm, so called, he let it down. On the morning of the accident he climbed the pole in question. Having reached the cross arm, he stood upon it, one foot before the other, with his knee slanted against the pole. In this position his face came half way between the top of the hood, so called, and the lower edge. Standing in this position, and balancing himself on the cross arm, he reached with his left hand by the globe, between the lamp and its metal standards, to get up to the hood board to throw the switch; and while reaching for the switch he received a shock, causing the injury complained of. Subject to exception, a witness for the plaintiff was permitted to testify that under certain conditions all the metal on the hood board and everything above the top of the pole could be alive. What such conditions are, or that they existed on the day of the accident, did not appear, unless inferentially. At the close of the plaintiff's evidence, the defendants separately moved for a non-suit; at the close of all the evidence, that a verdict be directed in their favor; and after the verdict, that it be set aside. All these motions were overruled, and the defendants excepted.

Burnham, Brown & Warren and William H. Drury, for plaintiff.

Oliver E. Branch and Joseph W. Fellows, for defendant Manchester Electric Co.

Taggart & Bingham, for defendant Union Electric Co.

BLONGETT, C. J.: The plaintiff's grounds of complaint against the Manchester Electric Company are (1) that they were negligent in not instructing him as to the increased danger in working upon pole lamps in wet weather; and (2) that they were also negligent in allowing the wires of the two companies to come in contact on Marion street. The first ground is untenable. The negligence complained of would be immaterial, unless it caused the plaintiff's injury. If the alleged enhanced danger to him on account of dampness was not adequately provided for by the cut-off switch, whose office and purpose it is, as he confessedly well knew and understood, to entirely cut out the current of electricity from the lamp, and so render it safe for cleaning and trimming under all conditions, we find no evidence whatever that dampness, if it appreciably existed at the time of his injury, would have rendered the shock to the plaintiff any different than it was, or that any parts of the mechanism outside the lamp were actually charged at that time. Suppose, however, that they were; it is certainly as likely, in any reasonable view of the evidence, that the plaintiff's shock was received from the charged lamp, the risk of which he assumed, as from the mechanism, and "an action for negligence cannot be maintained when the evidence fails to disclose an open, visible connection between the injury and the negligence alleged, and when the facts proved are equally consistent with a theory of the accident that would discharge the defendants as with one that would charge them." *Deschenes v. Railroad Co.*, 69 N. H. 285, 291, 46 Atl. 467. The second ground is untenable, also. Knowing, as he admittedly did, the risk of injury from the wires of his

employers coming in contact with the wires of other electric companies, and thus becoming charged and alive, the plaintiff, as before stated, manifestly assumed that risk as between himself and his employers; and, moreover, they had guarded him absolutely against that source of danger by means of the cut-off switch, the use and purpose of which, it is admitted, he fully understood. Irrespective, therefore, of the question of the plaintiff's own negligence, we are of opinion that the motion of the Manchester Electric Company for a non-suit should have been granted.

As against the Union Electric Company, the plaintiff assumed no risks of his employment. They stood as strangers to each other, and, as between them, the only rule to be applied is that of ordinary care. This rule required that the plaintiff should make use of such means of protection and safety as were within his control to guard against the risks that were known to or reasonably to be apprehended by him from the negligence of the company. Among those risks was that of their wires becoming crossed with those of his employers. But he was not only apprised of that danger and understood it; he was also equipped with a complete safeguard against it by turning the cut-off switch. It is true, he testified that he was attempting to do this when he received the shock; and therefore my brethren are of the opinion that the question whether he exercised ordinary care in his way and manner of doing it was properly left to the determination of the jury. I do not think so. On the contrary, it seems to me that the case discloses no evidence which would justify a finding by the jury of reasonable care on his part. In my opinion, the evidence was fairly susceptible of but two conclusions: First, that the plaintiff attempted to trim the lamp without turning the switch, as he had frequently done before; or, second, that, standing in the unnecessary and reckless way he did, "on the west end of the cross arm, with one foot in front of the other, supporting himself entirely by placing his knee against the pole, and without attempting to protect himself by

the use of his right hand, he reached around with his left," by the globe and between the metallic standards of the lamp, to turn the switch, which was on the south side of the lamp, and thereby received the injury for which compensation is sought. And, upon either of these conclusions, it follows that there can be no recovery against the Union Electric Company, because a person injured by his want of ordinary care, or by the joint operation of his own and another's negligence, is remediless. *Nashua Iron & Steel Co. v. Worcester & N. R. Co.*, 62 N. H. 159, 161, 162. The conditions mentioned in the question to which exception was taken evidently referred to dampness, and the exception therefore must be overruled. Judgment for the Manchester Electric Company and against the Union Electric Company.

YOUNG, J., did not sit. The others concurred as to the Manchester Electric Company.

NOTE 1.—The following additional cases relate to the subjects considered in Part III:

In *Reagan v. Boston Elec. L. Co.*, 167 Mass. 406 (Jan. 11, 1897), a person working on a roof was injured by shock from electric light wires strung over the building. The questions were of contributory negligence and plaintiff's right upon the roof. *Held*, that on the authority of *Illingsworth v. Boston Elec. Lt. Co.*, 5 Am. Electl. Cas. 312, and *Griffin v. United Elec. Lt. Co.*, 6 Am. Electl. Cas. 252, the question of contributory negligence was properly submitted to the jury, and that there was evidence that the plaintiff was rightfully on the roof.

In *Calumet Elec. St. Ry. Co. v. Grosse*, 70 Ill. App. 381 (June 14, 1897), a lineman employed by a telephone company was injured by shock from a trolley wire. *Held*, that electric wires on overhead structures several feet higher than could possibly injure a person in the exercise of his usual rights and duties in a highway, need not be perfectly insulated, so that no person could be injured by them, however extraordinary his duties.

In *Annie Wood v. Diamond Electric Co.*, 185 Pa. 529 (Apr. 18, 1898), an action brought to recover damages for the death by electricity of a person who voluntarily touched a wire screen which he had heard was charged with electricity, in order to demonstrate that it was not so charged, recovery was refused on the ground of contributory negligence.

In *Keefe v. Narragansett Electric Lighting Co.*, Rhode Island Supreme Court, June 22, 1898, a girl climbed out of a window of her residence on to the jet of an adjoining house, and while walking on the jet, came in con-

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tact with wires owned by a tenant of the building, which were connected with the defendant's electric wire, and received an injury by shock. *Held*, no cause of action, (1) because the wires were not owned by defendant, and (2) because the defendant had no reason to anticipate the presence of the plaintiff in the place where she was injured, and therefore would not have been bound to insulate even its own wires.

In *Citizens' Ry. Co. v. Gifford*, 19 Tex. Civ. App. 631 (Nov. 30, 1898). *held*, that the degree of care required of a company operating electric street cars, in order to exonerate it from liability to a person coming in contact with its wires in the street, must depend on the circumstances, the rule being that ordinary care is required.

In *Grennis' Admr. v. Louisville Elec. Lt. Co.*, 49 S. W. 184, Kentucky Court of Appeals (Jan. 26, 1899), an electric light company was held liable for its failure to properly insulate its wires on a roof to protect a boy working there; following *McLaughlin v. Louisville Elec. Lt. Co.*, 6 Am. Electl. Cas. 255.

In *Lewis' Admr. v. Louisville Elec. Lt. Co.*, Kentucky Court of Appeals (May 6, 1899), 50 S. W. 992, an electric light company was held liable for death caused by improper insulation, following the *McLaughlin* case.

In *Twist v. City of Rochester, impleaded with Rochester Railway Company and Rochester Gas & Electric Company*, N. Y. Supreme Court, Appellate Division, Fourth Department, February, 1899 (37 App. Div. 307), poles were erected by an electric light company under a contract with the city, which gave the latter the right to the exclusive use of a cross arm for the placing of telegraph or other electric wires owned by it, except for lighting and power, and for "any and all municipal purposes." Subsequently, the equipments of a trolley system were placed in the same street by an electric railway company, under an agreement with the city. Both these agreements reserved to the city the right of location and supervision, and otherwise to protect the streets from danger. After both the electric light and trolley lines were placed, the city placed a patrol line above them, upon the poles of the electric light company. The plaintiff's intestate, while walking in the street, was killed by electric shock due to contact with a broken end of a patrol wire, charged with electricity by contact with the trolley wire. The patrol wire was not insulated; it had no guard wires and no supports except at the insulators on the poles. Limbs of trees were liable to detach the patrol wires, so that they would fall upon the heavily charged wires below. The patrol line had been abandoned by the city for more than a year, and a parallel and safer route established, but the wires had not been removed. One of the wires had broken and dropped into the street several times, a horse having once been killed by the current from it; of all which the city official in charge of the line had notice. It also appeared that the broken wire which caused the death of plaintiff's intestate, had been pulled down by an employe of the trolley company, who was about to take hold of it again when the accident occurred.

Held, that the question of the negligence of the city was properly submitted to the jury; that it was gross negligence to permit the abandoned patrol wires to fall repeatedly upon the heavily charged electric light and trolley wires, and thence to the street to the great danger of the public. That the fact that the patrol line was used by the police department, which was created by law for the discharge of a public duty, did not free the city from liability; it appearing that the patrol line was not established by the police department, nor had it the power to establish such line. That the line was established by the city, and was the result of a business arrangement, and not in furtherance of public duty. That the city was not protected by a provision of its charter exempting it from liability for injuries due to the unsafe condition of its streets, in absence of actual notice to its officers, both because it appeared that the officers had notice and because the city needs no actual notice of its own negligent acts. That the question of contributory negligence was properly submitted to the jury. That the negligence of the city was a proximate cause of the injury, although the act of the employe of the railway company in pulling down the wire was a concurring cause; since if the wire had not broken the injury would not have occurred. Case of this series cited in opinion, *Quill v. Empire State Teleph. & Tel. Co.*, vol. 6, p. 303 (reversed, vol. 7, p. 761).

In *San Antonio Gas & Electric Co. v. Speegle*, 60 S. W. 884, Texas Court of Civil Appeals (Dec. 19, 1900), the following is a portion of the head note:

"Where plaintiff, in taking down a dead wire belonging to a company other than defendant, is injured by the wire breaking and coming in contact with an improperly insulated live wire of defendant, defendant's negligence in not having it insulated is a concurrent cause of the accident, rendering it liable, though, but for a defect in the wire which broke, the accident would not have happened.

"The accident to plaintiff by reason of the dead wire which he was taking down breaking and falling on a live, improperly insulated wire of defendant, strung along a street, where it was charged, is shown to be one which defendant might reasonably have anticipated, by evidence that larger wires frequently break."

In *Jones v. Finch*, Alabama Supreme Court, 29 So. Rep. 182 (Dec. 20, 1900), a person who negligently caused a telephone wire to fall across a trolley wire and remain hanging down into the street where a passing animal came in contact with it, was held liable for the death of the animal, and the driver was held not chargeable with contributory negligence—citing *McKay v. So. Bell Teleph. Co.*, 6 Am. Electl. Cas. 223; *Quill v. Empire State Teleph. Co.*, id. p. 303.

In *Smith v. East End Elec. Lt. Co.*, 198 Pa. St. 19 (Jan. 7, 1901), held that an electric light company is not charged with negligence by evidence that a person was killed by coming in contact with one of its wires on a house, at a point where the insulation was defective, there being no evidence of actual notice to it, nor of how long the defect had existed.

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In *J. M. Proctor v. San Antonio St. Ry. Co.*, 62 S. W. Rep. 939 (Texas Court of Civil Appeals, April 10, 1901), an electric street railway company was held to owe no duty to a man who went into the yard of the company to take his sons their dinner, the sons being at work under a contract with the company, caught a trolley wire with a hoe, and received a fatal shock.

In *Louise Gordon, Adma., v. Eugene L. Ashley*, 34 Misc. (N. Y.) 743 (Trial Term, May, 1901), the following is the head-note:

"A person who strings an electric light wire, used by him in lighting a village, in such a manner that it can and at times visibly does come in contact with a telephone wire, affording a connection which might cut the electric light wire by heat and attrition, is guilty of negligence, and cannot escape personal liability to the widow and children of one who was killed by coming in contact with the electric light wire, upon its severance and fall, as found by a jury, from a cause which he might reasonably have foreseen, by showing that, some time before the accident, he had transferred the plant and business to a corporation, as, it appearing that he was the president thereof and owner of nearly all the stock, it is apparent that he had power and authority to have the corporation remedy the defect, and, failing to have the corporation remedy it, he became a joint wrongdoer with it and may be sued separately."

In *Hart v. Mayor, &c. of Union City*, 64 S. W. Rep. 6 (Tennessee Supreme Court, June 15, 1901), a policeman was found dead under circumstances which indicated the possibility of his having received a shock from crossed electric wires; though after his death experiments showed that there was no crossing of the wires or anything else that would make them dangerous. *Held*, not sufficient to warrant recovery.

In *Scheiber v. United Telephone Co.*, 153 Ind. 609 (Dec. 15, 1899), a complaint alleging injury caused by lightning conducted into a store-room by defendant's wires, on account of their defective condition, and that the defect was due to the removal of a telephone belonging to another company, the predecessor of defendant, and not showing that defendant created the dangerous condition or had any opportunity to put the wires in a proper condition before the accident, was held insufficient.

In *Sophia Waller v. Leavenworth Light & Heating Co.*, 9 Kan. Ct. Ap. 301 (June 6, 1900), an action for damages from fire caused by defective insulation, it was held that where one electric light company purchases the plant of another company and continues its business, it impliedly contracts with its customers and the public that it will use such appliances and care as are known to the business to protect them from harm, and is liable to any one who suffers damage from its failure to do so.

In *Dechert v. The Municipal Elec. Lt. Co.*, 39 App. Div. (N. Y.) 490 (April, 1899), an electric light company made a contract, contained in two separate papers, by one of which it agreed to wire a place of business, by the other to furnish equipments and current for electric lighting. The latter paper contained a release in these words: "The company is hereby released from all claims for damages resulting from the use of electric cur-

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rent when the wiring and electrical equipments on the premises of the consumer shall have been approved by the New York Board of Fire Underwriters or other proper authority." The action was brought to recover damages for the destruction of the building thus wired and equipped, by fire due to alleged defective insulation of wires. The defendant's claim that it was protected by the release was rejected, it appearing that the approval given by the Board of Underwriters was limited to the "equipments," and it being held that it was not intended to include the wiring. *Held*, that the question of whether or not the work of wiring and insulating the wires was properly done, must be determined upon the testimony of witnesses familiar with such work, and that the rules of various electrical companies prescribing how such work should be done were incompetent.

In *Kepner v. Harrisburg Traction Co.*, 183 Pa. St. 24, Oct. 11. 1897, the plaintiff's horse became frightened by the breaking of defendant's trolley wire, and plaintiff, alarmed by the noise and electric flashes, and by the plunging of the horse, jumped from the vehicle and was injured. *Held*, that no presumption of negligence of defendant arose from the unexplained breaking of the wire.

In *Bergin v. Southern New England Teleph. Co.*, 70 Conn. 54, Nov. 30, 1897, an action brought by an employe of a telephone company for injury by shock while in the performance of his duties, held, that where a telephone company and an electric light company used the same poles, the law does not absolutely require the telephone company, as between it and its linemen, to inspect and test guy-wires and circuit breakers put in by the railroad company, to ascertain whether they are in safe condition.

In *Murphy v. Coney Island & Brooklyn Railroad Company*, 65 App. Div. (N. Y.) 546, December, 1900, an action in which an employe of an overhead trolley railway company received a shock while fastening span-wires to a "brookline" attached to an iron pole, in consequence of the defective condition of the "brookline," which was an insulating appliance designed to prevent the electric current from passing from the span wire into the iron poles, it appeared that the defect in the "brookline" was not inherent in the material or due to the construction, but was due to leakage, and it did not appear that the defect was visible. It appeared that no tests of the "brookline" were made by the defendant, who relied on the manufacturer, and there was no evidence that the manufacturer tested them. *Held*, error to hold as matter of law that the defendant had discharged its obligation toward the plaintiff.

In *Malay v. Mt. Morris Electric Light Co.*, N. Y. Supreme Court, Appellate Division, June, 1899 (41 App. Div. 574), the plaintiff, a lineman in the employ of an electric light company, defendant, informed the dynamo engineer that he was to hang a lamp at a certain place, and that the engineer should not turn on the current of electricity until informed by telephone that the work was done. While the plaintiff was at work, the engi-

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neer turned on the current, the plaintiff received a shock, and was injured. There was evidence that various instances of the engineer's incapacity had previously been brought to the attention of the superintendent and of the person who employed and discharged help, and the vice-president had been told of his incapacity.

Held, sufficient evidence to warrant submission to the jury of the question of defendant's negligence, within the rule that the plaintiff must establish (1) that the injury was due to the engineer's negligence; (2) that the engineer was incompetent, and (3) that the defendant had knowledge or notice of such incompetency.

NOTE 2.—Part III contains fifty-four cases reported in full, and memoranda of nineteen others in note 1, *ante*, all illustrative of the degree of care which companies using the electric current, mainly by means of wires in public highways and over buildings, owe to the public to prevent injury to person and property. While this is the general theme of all these cases, it may be instructive to group them with respect to certain specific principles.

It is undoubtedly true that the degree of care required of electrical companies is the same in kind as that which is required of all persons in their relations with each other, namely, the duty of reasonable care to avoid injury. Reasonable care is, however, a relative expression and circumstances of time, place, etc., are to be considered. It is commensurate to the danger. The electric current being highly dangerous and its nature such that it is invisible, inaudible, and incapable of ascertainment by any of the senses, except that of touch, and its touch is fatal, it follows that those using it or causing it to be conveyed in and along places where persons are reasonably to be expected to be, are bound to a very high degree of care. This is differently stated by the courts. Perhaps the strongest language used in defining the duties of electric companies is that contained in a series of Kentucky decisions commencing with *McLaughlin v. Louisville Elec. Lt. Co.*, 6 Am. Electl. Cas. 255, in which the duty is said to be that of "perfect protection" at points where persons are apt to come in contact with the wires, and the utmost care to keep them insulated. This is followed in *Schweitzer's Admr. v. Citizens' Gen. Elec. Co.*, *ante*, p. 571; *O'Donnell's Admr. v. Louisville Elec. Lt. Co.*, *ante*, p. 586, in which it is stated that perfect insulation is required where persons have the right to go for either business or pleasure; *Macon v. Paducah St. Ry. Co.*, *ante*, p. 630, and *Thomas' Admr. v. Maysville St. Ry. Co.*, *ante*, p. 587; *Overall v. Louisville Elec. Lt. Co.*, *ante*, p. 621, in which it was held that a trial court erred in charging the jury that the degree of care required was "the highest degree of care and skill of prudent persons in the same or similar business" was erroneous; *Gremnis' Admr. v. Louisville Elec. Lt. Co.* and *Lewis' Admr. v. Louisville Elec. Lt. Co.*, both being found in note 1, *ante*.

In New York it was held in *Caglione v. Mt. Morris Elec. Lt. Co.*, *ante*, p.

622, that electric companies are bound to take all care that a reasonable person can take to prevent the escape of electricity to the danger of life, while in *Wittleder v. Citizens' Elec. Illum. Co.*, p. 586, note, *ante*, it was held that the stringing of live electric wires so near a thoroughfare that contact of persons passing in the street is possible, is active negligence, in other words, nuisance.

In *Anderson v. Jersey City Elec. Lt. Co.*, *ante*, p. 557, it is held that an electric light company is bound to reasonable care to protect persons in places where it is reasonably probable that their duties as linemen of other electrical companies will bring them; in *Brown v. Edison Elec. Illum. Co.*, *ante*, p. 516, such companies are held bound to the duty of protection to persons where they have a right to be in the exercise of a lawful occupation. In *Perham v. Portland Elec. Co.*, *ante*, p. 487, it is said to be the duty of "utmost care." In *Will v. Edison Elec. Illum. Co.*, *ante*, p. 642, *held*, that the duty is that of the very highest degree of care to persons rightfully there, whether from necessity or mere convenience. In *Griffith v. New England Teleph. & Tel. Co.*, *ante*, p. 707, *held* that electric companies are bound to use such known and approved devices as are necessary to guard against accidents from lightning conducted over their wires. In *Leonard v. Brooklyn Heights R. Co.*, *ante*, p. 683, *held*, that the duty of an electric street railway company to protect its passengers from injury by shock is a "very high degree of care."

Bearing in mind that reasonable care under the circumstances is the fundamental requirement, it not only follows that a very high degree of care should be required to keep electric wires properly insulated in places where persons may be reasonably expected to be; but follows none the less logically that a much less degree of care is requisite in places where persons are not reasonably expected to go. Thus electric companies have been held not liable for injuries occasioned to a person walking upon the girder of a bridge many feet above the roadway (*Freeman v. Brooklyn Heights R. Co.*, *ante*, p. 611), on the top of a wooden awning sixteen feet above the street (*Brush Elec. L. & P. Co. v. Lefevre*, *ante*, p. 598); upon structures so high that no person could reasonably be expected to be injured by them, however extraordinary his duties (*Calumet Elec. St. Ry. Co. v. Grosse*, note 1, *ante*); upon a jet in front of a house (*Keefe v. Narragansett Elec. Lt. Co.*, note 1, *ante*). It has also been held that a telephone company is not bound to provide against accidents which could not be anticipated or guarded against except by constant patrol of its whole line (*Fitch v. Central N. Y. Teleph. & Tel. Co.*, *ante*, p. 565); also that it is not negligence as matter of law, where wires have been prostrated in many places at once by an unusual and unexpected storm, to allow a delay of several hours before repairing a broken wire (*Boyd v. Portland Elec. Co.*, *ante*, p. 605).

The rule, "*res ipsa loquitur*," in other words, that certain conditions constitute *prima facie* evidence of negligence so as to require proof by the defendant to rebut the same, is frequently applied in actions against elec-

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trical companies. Such are the following cases, *ante*: *Boyd v. Portland Elec. Co.*, p. 605; *Chattanooga Elec. Ry. Co. v. Mingle*, p. 592; *Doolin v. Beacon Light Co.*, p. 563; *Newark Elec. L. & P. Co. v. Ruddy*, p. 526; *O'Flaherty v. Nassau Elec. R. Co.*, p. 535; *Leavenworth Coal Co. v. Batchford*, p. 433; *Trenton Pass. Ry. Co. v. Bennett and Cooper*, p. 444; *Snyder v. Wheeling Elec. Co.*, p. 473; *Dwyer v. Buffalo General Elec. Co.*, p. 456; *Jones v. Union Ry. Co.*, p. 447. In *Poulsen v. Nassau Elec. R. Co.*, *ante*, p. 675, the same rule is applied where a trolley car was traveling on a track in a blaze and a passenger was injured.

With respect to the care or negligence of the person injured by shock from electric wires, it is held in *Will v. Edison Elec. Illum. Co.*, *ante*, p. 642, and *Mitchell v. Raleigh Elec. Co.*, *ante*, p. 644, that a person has the right to presume that electric wires maintained in a place where persons are liable to be are properly insulated. In *Newark Elec. L. & P. Co. v. McGilvery*, *ante*, p. 529, it is held that an electric company owes no duty to one who has broken down its wires except to refrain from wilful acts to his injury. In *Anderson v. Jersey City Electric Lt. Co.*, *ante*, p. 561, note, and *Wood v. Diamond Elec. Co.*, note 1, *ante*, it appeared that the person injured in each case voluntarily touched the wire which he had heard was charged with electricity, in order to demonstrate that it was not so charged, and recovery in each case was refused on the ground of contributory negligence. In *N. Y. & N. J. Teleph. Co. v. Bennett*, *ante*, p. 543; *W. U. Tel. Co. v. Griffith*, *ante*, p. 602, and *Rowe v. N. J. Teleph. Co.*, *ante*, p. 626, where the wire which was the immediate cause of the injury received its current from a wire of another company, upon which it had fallen or too near to which it had been placed, recovery against both companies was sustained, or they were held to have been properly joined as defendants. In *Kansas City v. File*, *ante*, p. 539, an electric light company and a city were held to have been properly joined as defendants, a broken electric light wire having been allowed to remain in a street for a long time.

With respect to the duties of electric light companies to their employees, it is held in *Moran v. Corliss Steam Engine Co.*, *ante*, p. 743, that a master using machinery operated by electricity is bound to a very high degree of care for the protection of his employees; on the other hand, it is held in *Carr v. Manchester Elec. Co.*, *ante*, p. 746, that the danger of shock due to crossed wires is a known risk of a lineman's employment; in *Anderson v. Inland Teleph. & Tel. Co.*, *ante*, p. 725, that an employe cannot recover from his employer for shock caused by a span-wire of the latter, a telephone company, coming in contact with the trolley wire, it appearing that inspection of the wires was a part of the employe's duty, and that he had the appliances for inspection with him; and in *Epperson v. Postal Tel. Cable Co.*, *ante*, p. 736, that a lineman has no right to rely on his foreman's assurance that there is no danger if he in fact have facilities for knowing, and does know, to the contrary.

PART IV.

MISCELLANEOUS.

(759)

JEREMIAH QUILL, Respondent, v. THE EMPIRE STATE TELEPHONE AND TELEGRAPH COMPANY, Appellant.

New York Court of Appeals, April 18, 1899 (reversing 6 Am. Electl. Cas. 303).

(159 N. Y. 1.)

INJURY BY ELECTRICAL APPLIANCE.

A person not in defendant's employ, while attempting to change the position of a telegraph wire, dislodged an insecure insulator, which fell and injured the plaintiff standing in the street. The defendant owned the pole. It also owned the arm and the pin thereon, upon which the insulator rested, and turned them over, years before, in good condition, to another company to use; which latter company owned and controlled the wires and insulator.

Held, that the defendant was not responsible for the plaintiff's injury.

Appeal from judgment of Supreme Court, General Term, Fifth Judicial Department, affirming a judgment entered upon a verdict for plaintiff, and an order denying a motion for new trial.

Frederick E. Storke, for appellant.

E. C. Aiken, for respondent.

PARKER, Ch. J.: The plaintiff, while standing on the south side of a telephone pole belonging to this defendant, and under the end of the lower cross arm, was struck by a glass insulator that, in an attempt to change the position of a telegraph wire, was thrown from the pin upon which it had been placed. The taut wire, as it was being raised, caught under the insulator and lifted it from the pin. The person who raised the wire was not in the employ of the defendant nor connected with it in any way. He was an employe of the city of Auburn, who discovered that there was some difficulty with the wires and went up the pole of his own motion for the purpose of remedying it. For the injuries that the plaintiff suffered he succeeded in ob-

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taining a judgment against the defendant, predicated necessarily upon the ground that the defendant failed to perform some duty that it owed to the traveling public, of which the plaintiff was one. It is very difficult to point out the act claimed to constitute an omission of duty. Indeed, without an ingenious use of authority, which seems sometimes to be resorted to to prove what is obviously untrue, the task would scarcely be undertaken by any one.

The facts are not in controversy, and a statement of them will, I think, support the assertion made. It is true that the defendant was the owner of the pole, which was in height ninety-six feet, in circumference at the base six feet, and had upon it twenty cross arms, each of which was ten feet in length and bore ten pins; the bottom cross arm, from which the insulator fell, was forty-seven feet from the ground. Now, while this was the defendant's pole, it did not make use of all of the arms. The two uppermost arms were occupied by the American Telephone and Telegraph Company; the thirteen arms immediately below were used by this defendant; the succeeding four arms below had no wires on whatever; the twentieth, and last, arm was used exclusively by the Western Union Telegraph Company, and it was from this arm that the insulator fell. It seems that when this large pole was being erected for the use of the defendant, the manager of the Western Union Telegraph Company complained that the effect of it would be to interfere with his company's use of a pole near by that carried the wires of that company, and thereupon he was told that as soon as defendant's pole was up, the Western Union Company could either put on a cross arm or use the bottom cross arm that the defendant had put on, as defendant would have no use for it. This settlement of the difficulty was accepted, and immediately after the erection of the pole the Western Union Company took possession of the lower cross arm and exclusively used it from that time on until after the happening of the accident. It is not pretended that the defendant exercised any authority over this arm, or

claimed the right to exercise any, or could have done so if it chose after the arrangement between it and the Western Union Telegraph Company. The evidence shows that it agreed with the Western Union Telegraph Company either to permit it to put on an arm of its own or make use of the defendant's lower arm, but it is nowhere suggested that it agreed to furnish glass insulators or that it did furnish them. The only evidence that I am able to find bearing upon the question as to whether there was an insulator on the arm when the Western Union took possession of it, tends to show that there was none. It consists, first, of the agreement, which was that such company should have the use of the lower arm simply, and, second, of the testimony of Robert Lunney, that "there never has been a telephone fixture upon the bottom arm since I have known about the company." The evidence does not, therefore, permit a finding that the glass insulators were upon the pins and were turned over to the possession of the Western Union Telegraph Company with the arm.

The situation then, so far as this defendant is concerned, is this: It turned over to another company the use of a part of its property, consisting of an arm of a telephone pole and the pins thereon, all of which were and still are in perfect condition; the Western Union Telegraph Company took possession of the pole, strung seven or eight wires thereon, and thereafter continued in the exclusive occupation of it down to the 27th of June, 1891, when an employe of the city government, having no relation whatever to any of the corporations owning or using the pole, went upon it for the purpose of making some temporary alteration in the position of the wires, and in attempting to do so lifted directly upwards a wire that rested against one of the pins, and which caught under the glass insulator, raised it up from the pin and threw it to the ground. The defendant is certainly not responsible, under this evidence, on the ground that it turned over to the Western Union Company the insulator thrown off, for it did not furnish it. Nor is it responsible for

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every act done or omitted on the lower arm of the pole, simply because it owns it. The neglect, if any there was, on the part of either the owner or occupant of the pole, was that of the Western Union Company in omitting to catch the insulator on the thread of the pin, and for its omission of duty the owner is not responsible.

If there were any doubt about that question before the decision of the court in *Holmes v. Union T. & T. Co.*, 7 Am. Electrl. Cas. 765n., 41 N. Y. S. R. 767, affirmed in this court on opinion below (139 N. Y. 651), there has been none since that decision in this State. In that case the defendant's poles were also used to string wires of a local company for messenger service; a heavy fall of rain and snow so weighted the wires that some of them were broken and fell to the sidewalk; the outcome was an injury to the plaintiff in that action, but it could not with certainty be told whether the wire into which the plaintiff's feet became entangled, and which caused him to fall, was the wire of the defendant or the wire of the messenger service company; the jury being charged that the defendant was obliged to take care of its own wire, but was not obliged to take care of its neighbor's, found in favor of the defendant, and an exception taken to the charge of the court was ineffectually relied upon in the General Term and in this court for a reversal. In this case the evidence points to the Western Union Telegraph Company as the company responsible for the insulator being upon the pin without being screwed down, but in any event the state of the evidence is such that it will not support a finding that this defendant furnished the insulator, or put it on, or had anything to do with it whatever.

The judgment should be reversed and a new trial granted, with costs to abide the event.

All concur, except O'BRIEN, J., dissenting.

Judgment reversed, etc.

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NOTE.—The following is the opinion of the General Term of the Supreme Court, adopted by the Court of Appeals, in the case of *John M. Holmes v. The Union Telegraph and Telephone Co.*, referred to in the foregoing case:

MAYHAM, J.: The defendant erected its poles and strung its wires along or upon a public street in the village of Glens Falls for the purpose of telephone service, and had so used the poles for more than a year at the time of the alleged injury.

The undisputed evidence also shows that wires used for messenger service were also strung along on these poles, but without the affirmative consent of the defendant.

On the occasion of a rain and snow fall, ice accumulated on the wires attached to these poles in such quantities that some of the wires were broken and fell down upon the sidewalk, and one of the defendant's employes pushed the broken wire from the sidewalk into the gutter, where it was permitted to remain for some time and to become frozen into the ice or mud upon the street, forming a loop through which plaintiff tripped, fell, and was injured.

On the trial the defendant contended and sought to establish by proof that the fallen wire, by reason of which the plaintiff fell and was injured, was not the wire of the defendant, but the wire of the messenger service, which the defendant did not erect, and over which the defendant exercised no control, and out of this contention arises the chief point of controversy on this appeal.

The learned trial judge charged the jury in various forms in substance and effect that if it was not the defendant's wire that caused the injury, then the defendant was not liable; that the defendant was obliged to take care of its own wire, but it was not obliged to take care of its neighbor's. If it owned or had charge of this wire, then it was its wire to take care of. The plaintiff excepted to this part of the court's charge, and upon that exception and alleged misdirection of the learned judge the plaintiff seeks to reverse the judgment in this action. We see no error in this direction or charge of the learned judge.

The complaint in this action charges the defendant with negligence, and the action was prosecuted upon the theory that the injury was caused by the negligence of the defendant, and not upon the theory that the defendant had permitted the use of its poles by another in such a manner as to become a nuisance. The complaint alleged: "That the defendant so carelessly and negligently took care of, managed and used said telegraph poles and the wires strung upon the same, did carelessly and negligently permit the wires to become broken or detached from the poles, so as to lay upon and along the highway and street, etc."

There was no averment in the complaint for keeping, maintaining or suffering a nuisance, but mainly for negligence in permitting the wire on its poles to fall upon the street. If this had been the act of the defendant it would clearly have presented an act of negligence which unexplained would have presented ground of recovery by the plaintiff for the injury,

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or at least the jury might have so found, under the instruction of the learned trial judge in his charge. But the case was not tried upon the theory that the defendant was liable for maintaining a nuisance by permitting some other person to use its poles in such a manner as to create a nuisance, and we do not think that position should be now assumed for the purpose of reversing this judgment.

In *Dickinson v. The Mayor*, 92 N. Y. 588, the Court says: "The allegations in the complaint tend to establish that the defendant neglected to perform a duty in not removing the ice and snow from the walk. This is not an averment for keeping, maintaining or suffering a nuisance, but merely for neglect in not moving the ice and snow. The complaint was not for a positive wrong committed by the defendant, but for injury caused by reason of defendant's neglect. The authorities establish a distinction between actions for wrong and actions for neglect," and the court in the case from which the above is quoted cites numerous cases sustaining that doctrine.

The court in this case hold that when the gist of the action alleged in the complaint is negligence, the plaintiff, in order to recover, must show that the defendant has failed in the use of ordinary diligence in the discharge of some duty incumbent upon it.

Was it incumbent upon the defendant to look after and keep in position the wires of the messenger service, which was a distinct and independent company, and which put up its wires on defendant's poles without the permission of the defendant? We think not. There is nothing in this case which shows that the defendant bore such relation to the messenger company as to make the former liable for the negligence or misconduct of the latter. The rule seems well settled that to render one person liable for the negligence of another, the relation of master and servant, or principal and agent, must exist. *Stevens v. Armstrong*, 6 N. Y. 435; *English v. Brennan*, 60 id. 609. There seems to be no evidence in this case from which it can be found or reasonably inferred that either of the above relations existed between the defendant and the messenger company. If we are right in that conclusion, then the negligence of the messenger company cannot be imputed to the defendant. They were, so far as the management of their respective wires were concerned, each independent of the other, and one in no way responsible for the acts or negligence of the other as to third persons, unless the implied license by the defendant to the messenger company to attach its wires to the defendant's poles in some way created a liability on the part of the defendant for the negligence of the messenger company.

There is no pretense that the defendant's structure or telegraph pole was unsafe, or that any injury resulted to the plaintiff from it. It was the wire either of the telegraph company or of the messenger company that produced the injury. If the wire of the telegraph company, then the judge charged the defendant would be liable. If of the messenger com-

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pany, then the defendant was not liable. But it is insisted by the appellant that the fact that the defendant permitted the messenger company to attach its wires to defendant's poles made the defendant liable in any event for the injury resulting from negligence of the messenger company in negligently permitting its wires to become detached from the poles by reason of which the defendant was injured.

Thus is presented the question whether a party who owns and possesses a structure lawful and safe in itself, and who permits another, under an implied license, to use for a lawful purpose some portion of the same, is liable for the negligence of the one using to third persons who are injured thereby. The principal authority cited urged by the learned counsel for the appellant, in support of appellant's contention on this point, is the case of *Timlin v. The Standard Oil Co.*, 54 Hun, 44, 26 St. Rep. 42; affirmed in Court of Appeals in 126 N. Y. 514, 37 St. Rep. 906.

We think that case clearly distinguishable from the one at bar. In that case the Acme Oil Co. leased of the owner for the use of the Standard Oil Co. a wall, which was, as was found by the jury to be, a dangerous structure at the time of taking the lease. The other defendants were tenants and agents of the Standard Oil Company. The owner of the premises was not made a party. The defendants were all either lessees and occupants of the defective wall, or the agents of such lessees. The wall was, therefore, in the natural occupancy and control of the defendants, and as the jury found it to be a nuisance, the defendants who occupied and maintained it were liable to the person who was injured by its fall. In that case the wall which fell was in the possession of the defendants and under their control. In the case at bar the wire of the messenger company was in its possession and under its control, and not under the control of the defendants. If the defendant's pole had fallen and produced the injury and the action had been brought against it for the injury, the cases would have been parallel.

Then it would have been the duty of the defendant in the use and possession of the wire to have exercised care in preventing its wire from falling and injuring the plaintiff. The defendant owed a duty to the plaintiff and the public in relation to its own wire and wires in its possession and under its control. But it owed no duty to the plaintiff in relation to the wire of the messenger company, unless the messenger company was the servant, employee or agent of the defendant.

No such relation existed between the defendant and the messenger company. *Timlin case, supra*. LANDON, J., says: "The defendants are liable if they owed a duty to the plaintiff's intestate respecting this wall which they failed to perform, and because of such failure the wall fell and killed him."

The duty in that case arose out of the defendants' possession of the wall and its control over it. No such duty can be charged upon the defendant here arising out of the messenger company's wires, which were not in the defendant's possession and over which defendant exercised no control.

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The charge to the jury was therefore correct, and the judgment should be affirmed.

Judgment affirmed, with costs.

LEARNED, P. J., concurs; LONDON, J., not acting.

The following are memoranda of other cases upon the same general subject of injuries by electrical appliances, but not due to the electric current:

In *City of Denver v. Sherrett*, U. S. Circuit Court of Appeals, Eighth Circuit, June 27th, 1898 (88 Fed. Rep. 226), a municipal corporation and an electric company were joined as defendants in an action for damages for personal injuries caused by the falling of an electric light pole to which were attached the wires which supported a lamp used in lighting the city streets. It was held that the city did not, by permitting the use of the streets for the purpose of the electric light plant, thereby become charged with the duty of maintaining the appliances in a safe condition, but would only be liable after notice, actual or constructive, of danger due to some defect in the appliances and lack of due diligence in obviating the danger; also that the electric light company was bound to use only ordinary care in the maintenance of its appliances.

In *Cumberland Teleph. & Tel. Co. v. Cook*, 103 Tenn. 730, Jan. 13, 1900, held that a telephone company cannot be held liable for improperly locating its poles unless the safety of travel is endangered; also that in an action for injuries sustained by a traveler by colliding with a telephone pole, it is not enough to allege in the pleading that the pole was negligently or wrongfully placed; facts showing the same must be averred.

In *Hovey v. Michigan Teleph. Co.*, 124 Mich. 607, Sept. 13, 1900, in which damages were sought for injury to a horse occasioned by contact with a wire suspended in the street, held, that the following questions were for the jury, viz.: Whether or not the plaintiff was negligent in failing to see the wire; whether defendant could hang its wires across the street for such time as might be necessary to make proper connections without taking measures for the protection of travelers; whether plaintiff was driving at an unusual speed in violation of an ordinance.

In *Joseph v. Edison Elec. Co. and People's Telephone Company*, Louisiana Supreme Court, 104 La. 634, Jan. 7, 1901, in which damages were sought for injury to a minor child who was struck by a falling pole while she was passing in the street, it appearing both that the pole was rotten and that a deep and wide excavation had been made outside the pole and the pole left unsupported for a considerable time, it was held that the conduct of the electric light company, which maintained the pole, and of the telephone company, which made the excavation, was little short of criminal negligence.

PATRICK MCGUIRE, Respondent, v. THE BELL TELEPHONE
COMPANY OF BUFFALO, Appellant.*New York Court of Appeals, May 17, 1901.*

(167 N. Y. 208.)

INJURY TO EMPLOYEE BY DEFECTIVE POLE.

A pole erected and owned by an electric light company was used, under a mere license, by a telephone company, the defendant, as part of its permanent plant. It broke, and injured a lineman of the defendant, while working upon it. Several months before the accident the pole had been inspected by employes of the electric light company, and found to be unsafe, but had not been inspected by the defendant. It was the practice of defendant and of similar companies to make special examination of poles, not by its linemen, but by inspectors employed for that purpose. *Held*, in an action by the lineman for damages, that a refusal to charge that the defendant owed the plaintiff no duty to inspect the pole was properly refused.

Dissenting opinion by PARKER, C. J.

Cases of this series cited in opinion: *Flood v. W. U. Tel. Co.*, vol. 4, p. 402; *Dixon v. W. U. Tel. Co.*, vol. 6, p. 803.*Helen Z. M. Rodgers and Adolph Rebadow, for appellant.**Henry Sheldon Bacon, for respondent.*

CULLEN, J.: The action is servant against master to recover damages for personal injuries. The plaintiff at the time of his injury was a lineman in the employ of the defendant, and pursuant to the direction of his foreman had climbed a pole on which the defendant's wires were strung for the purpose of tightening those wires. While engaged in this work the pole broke and the plaintiff was precipitated to the ground, receiving severe injuries. It then appeared that the pole was decayed and rotten in the interior with a mere shell of sound wood on the outside. It is conceded that the defective condition of

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the pole caused the accident. The evidence shows that this condition of interior decay without external manifestation is common in telegraph or telephone poles, and that to discover it poles are tested at intervals by digging down at the base of the pole and driving into the pole a crow bar or screw driver. These tests are not made by men while engaged in stringing the wires, but by separate gangs sent out for the purpose of inspection. When any pole is found to be unsound it is replaced by a new one. The pole which broke had been found, months before the accident, to be decayed and unsafe; but the inspection which revealed this fact was not made by an inspector of the defendant, but by a foreman of another company. The pole in question belonged to the Rochester Gas & Electric Company, which had erected a line of poles and wires for the purpose of supplying electric light, and it was its foreman who found that the pole was decayed. The defendant strung its wires on the poles of the gas and electric company by the license or permission of that company. No inspection of the pole was shown to have been made by the defendant at any time.

The unanimous affirmance by the Appellate Division of the judgment entered on the verdict is conclusive upon us that the evidence of defendant's negligence was sufficient to support the verdict. *Reed v. McCord*, 160 N. Y. 330. The only question in this case that survives such affirmance arises on the charge of the trial court and its refusal to charge the defendant's request. The court charged that the defendant was not relieved from responsibility by the fact that it was not the owner of the defective pole, and that it was its duty to exercise reasonable care by way of inspection to see that the pole was safe. The defendant excepted to the charge that the ownership of the pole by another company did not relieve it from responsibility, and asked the court to charge that it owed the plaintiff no duty to inspect the pole. This request the court refused, and the defendant excepted. It will thus be seen that the question raised by these exceptions, whether the defendant owed the plaintiff

any duty to inspect the pole, it being owned by another company, is one of the very questions necessarily determined by the denial of the motion to dismiss the complaint. But, as the question was raised without any request for the direction of a verdict or for a non-suit, the appellant is entitled to have it passed upon by this court. Upon the manner or shape in which the question of law is presented depends the right of review by us. In the case of a unanimous affirmance we are precluded by the constitution from looking into the record to see if there is any evidence to support the verdict. But a party is entitled to have his case submitted to the jury with correct instructions as to the law, and we are equally precluded from looking to the evidence to see whether the propositions requested to be charged would logically have been fatal to the disposition of the motion for a non-suit or for direction of a verdict.

The master personally owes to his servants the duty of using ordinary care and diligence to provide for them a reasonably safe place to work, and sound and suitable appliances and materials with which to work, and is bound to inspect and examine these things from time to time, and to use ordinary care to discover and repair defects in them. *Shearman & Redfield on Negligence*, sec. 194; *Kain v. Smith*, 80 N. Y. 458; *Cone v. Delaware, L. & W. R. R. Co.*, 81 N. Y. 206; *Probst v. Delamater*, 100 N. Y. 266; *Doing v. N. Y., Ontario & Western Ry. Co.*, 151 N. Y. 579. "Reasonable care involves proper inspection, and negligence in respect of it, in such cases as this, is the negligence of the master, and none the less so when the inspection is committed to a servant." *Byrne v. Eastmans Co.*, 163 N. Y. 461. See *Durkin v. Sharp*, 88 N. Y. 225; *Bailey v. R., W. & O. R. R. Co.*, 139 N. Y. 302; *Hankins v. N. Y., L. E. & W. R. R. Co.*, 142 N. Y. 416. The application of this rule may depend on the nature of the work and the manner of its conduct. If this injury had occurred to the plaintiff while engaged in the erection of a telegraph line, from the act of other workmen in the selection of an unsafe pole when the master had provided a sufficient number of sound poles, it may be that such selection would

poles may be decayed and unsafe, and that he must discover their condition for himself. Neither these cases nor the one cited from Massachusetts are authorities where it is shown to be the practice for the companies to make special inspections. There is, therefore, nothing in the present case, unless it be the ownership of the pole by another company, to take it out of the general rule laid down by Judge LANDON in *Byrne v. Eastmans Co.* (*supra*), that "reasonable care involves proper inspection, and negligence in respect of it is the negligence of the master."

I do not think that the fact that the defendant did not own the pole which fell relieved it from the duty of reasonable inspection to see that the pole was safe. The pole formed part of the permanent line of the defendant through the streets of the city of Rochester. On that pole the defendant strung its wires. The stringing of the wires necessarily subjected the pole to strain, which would be increased by the weight of the lineman whenever he ascended the pole. If the pole was unsound and inadequate to bear this strain it would naturally result in the pole breaking down. The defendant's own work, therefore, was an essential factor in and a proximate cause of the falling of the pole. Certainly, if the pole had injured a passer-by, it would be no answer for the defendant to say that it did not own the pole. It was bound, both as to third parties and as to its own workmen, to erect and maintain a reasonable safe structure, and it had no right to use for that purpose an unsafe appliance, whether its own or that of a third party. By using the pole as part of its line, it adopted it as its own. As it would have been liable had the pole when first used been decayed and insufficient for the purpose of carrying its wires and supporting its linemen, it was equally liable when the pole subsequently became unsafe from decay, which reasonable inspection would have discovered. The duty of the defendant was just as great to safely maintain as to safely construct, and that duty cannot be delegated so as to exempt the master from liability. But I do not see that the defendant has delegated this duty. It received from the Roch-

ester Gas & Electric Company a bare license to string wires on the poles. The latter company received no compensation for the privilege; it made no agreement to maintain the pole securely, and made no representation as to its condition or sufficiency. It would seem, therefore, that it owed the defendant no duty as to the safety of the pole which the latter used at its own risk, and it is questionable whether the Rochester company was bound to exercise any affirmative vigilance in favor of the defendant's employees. *Larmore v. Crown Point Iron Company*, 101 N. Y. 391. Had the defendant contracted with the owner of the pole for its proper inspection and repair or replacement, a different question would be presented, and it might be argued that in securing such an agreement it had exercised reasonable care to provide its workmen with a safe place and safe appliances. But as the defendant did not contract with others to inspect and repair the pole, that duty rested upon it.

It is claimed by the learned counsel for the appellant that the rule held by the trial judge in this case would lead to most unreasonable results. It is said that under the doctrine of the charge a merchant would be liable for injuries suffered by his traveling salesmen on railroads which the employer had neglected to inspect, and that a master would be similarly liable for defects in an elevator which his workmen might be compelled to use in going to a place where they were to do their work. These are false analogies, and the doctrine of the trial court leads to no such conclusions. When it is said that the master is bound to furnish his servants a reasonably safe place in which to work, it is plain that this rule applies only where, in the ordinary conduct of the business, the master furnishes the place. In many occupations the master does not furnish the place for work at all. Such is the case in the instances suggested by the learned counsel and many others, as where a master mechanic sends his journeymen to make repairs in the buildings of others, or where a contractor having agreed to cut timber from land employs laborers for the purpose. Instances might be multiplied indefi-

nately. In all these cases the exemption of the master from liability (except for hidden danger of which he has knowledge, and which it would be his duty to disclose to his servants) is based, not on the theory that he may rely upon the owners of the premises having done their duty, but for the reason that in no proper sense of the term does he furnish the place. It is not so here, however. The pole was part of the permanent plant of the telephone line which the conduct of the business made it the duty of the master to furnish. The pole was in the possession of the master so far as it was capable of being possessed by anyone. It was in constant service in maintaining the defendant's wires, and apparently at all times subject to be ascended by its servants when the necessities of the defendant's business might require. If the license received by the defendant from the gas and electric company did not permit it to properly inspect the pole to ascertain its safety (which I deny) then the fault lay with the defendant in using a pole the contract as to which with its owner precluded it from seeing that it was safe.

It is said that the plaintiff knew that the pole did not belong to the defendant. This is true. But it does not appear that he had any knowledge of the terms of the agreement under which the defendant used the pole. He is not chargeable with notice of the fact that under the agreement the defendant, as is claimed by its counsel, had no right to inspect the pole or repair it, and the owner was under no obligation to do either. He cannot be said to have assumed the risk of such a situation.

The case of *Dixon v. Western Union Telegraph Company*, 6 Am. Electl. Cas. 803, 68 Fed. Rep. 630, is plainly distinguishable from the one at bar, and was doubtless well decided. The pole on which the plaintiff met his injury through the defective character of the clamps or steps attached to it, not only was not the property of the defendant company, but was not in any way used by it as a part of its line or plant. The occasion to ascend the pole arose from the fact that the wires on the pole interfered with the defendant's wires, and, hence, it was neces-

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sary to shift the position of those wires. The use of the pole was, therefore, as stated by the learned court, casual, and the decision of the court that the defendant was not liable for the condition of the pole proceeded on this ground, a ground which has no application to the present case.

The judgment appealed from should be affirmed, with costs.

LONDON, J.: I concur with Judge CULLEN. As in the case of railroad cars, the company which uses them owes the duty to its servants of proper inspection as to their safety, whether such cars are its own or come to it from another line and company, so it seems to me that this telephone company, which uses the poles of another company, owes to its servants the like duty. The case of *Flood v. Western Union Telegraph Co.*, 4 Am. Electl. Cas. 402, 131 N. Y. 603, has but little resemblance to this case. There the workman subjected the detective cross-arm of the telegraph pole to an extensive strain without looking, as he had full opportunity to do, to see whether it could bear it. The opinion of the court convicts him of gross carelessness. Here the workman had no opportunity to make inspection or means to do it with. The pole was part of the master's business plant, and, however acquired, it was the master's so far as the relations between master and servant were affected by it. An elevator or railway car or other property wholly controlled by others is no part of the master's plant when his use of it is simply that of a customer or occasional repairer, and thus unlike this.

PARKER, Ch. J. (dissenting): Defendant's foreman in its behalf requested permission of one Martin, the foreman of the Rochester Gas and Electric Company, to use certain of its poles to support defendant's telephone wires. Permission was granted, and several of such poles were used in connection with defendant's poles, the object being to lessen the number of poles used in a given street, and the defendant reciprocated by allow-

ing the Rochester Gas and Electric Company to make a similar use of such of its poles as was desired. The plaintiff, a lineman in defendant's employ, on the twenty-third day of August, 1898, went up one of the poles thus used by the defendant, for the purpose of taking the slack out of the wires on that stretch. While he was at work the pole fell to the ground, severely injuring him.

An examination disclosed that the pole fell because it had become rotten beneath the surface of the ground. Above the ground the pole not only appeared to be, but was in fact in good condition. Upon that subject the plaintiff testified: "The outward appearance was good. It was perfectly sound so far as I could see, from the top of it down to the ground. I looked at the pole, that was all. To all appearances it looked sound. . . . Before climbing a pole I just look at the pole for the purpose of seeing whether there was any rottenness from its external appearance. I didn't see any rottenness. I always did that in climbing the pole; I looked at the pole. . . . I had no idea or thought that any of these poles were rotten or in bad condition. I could not tell from the outward condition of the pole, *nor could any other man.*"

There is only one method—so the witnesses on this trial agree—by which rottenness such as caused this pole to fall can be discovered, and that is to remove the earth from around the pole to a depth of something like a foot, and then take an iron bar and attempt to thrust it into the pole at about the bottom of the excavation. The plaintiff testified: "The only way you can discover whether a pole is in good or bad condition at its base would be to take a shovel and a bar and dig down under the surface, a foot or half a foot, and then see if the crowbar will go through the pole. . . . I have seen the foreman do it. I have seen him shovel the dirt around the pole and take his crowbar and tap the pole for the purpose of seeing whether it is rotten or not; that is the way it is done." A lineman for the Rochester Gas & Electric Company said: "I have tested poles

for that company. In testing we use a bar, and dig around the pole probably six inches; dig down and drive the bar in, and if the bar sinks pretty well in we call the pole pretty rotten. We then report them on a slip and give them to the foreman and he has them changed."

Without contradiction, then, it is established in this record that the only method of inspection by which it was possible to ascertain the condition of this pole was by making an excavation about it, and then attempting to thrust an iron bar into the pole at the lower part of the excavation, acts which this defendant had no right to perform under its bare permission to use the pole for the purpose of stringing its wires, but acts which the Rochester Gas & Electric Company had both the right and the duty to perform, because it constituted the only method of inspection by which it could be kept advised of the condition of its poles. It owed a duty to the public, which gave it permission to use the streets for the erection of poles, to see to it that they should not become rotten, thus threatening danger to passers-by on the public streets.

The Court said in the course of its charge to the jury: "He (the plaintiff) had a right to assume that the defendant had performed its duty in exercising reasonable care in furnishing him a safe place to work, and if the defendant omitted that duty, and by reason of that omission this accident occurred, then the defendant is liable. . . . Now, gentlemen, I charge you that the mere fact that these poles were owned by another company did not relieve the defendant from the responsibility of inspecting them to see whether they were in a safe condition for the plaintiff to perform his work just as much as if defendant owned them." At the close of the charge the counsel for the defendant requested the court to instruct the jury "that the defendant owed the plaintiff no duty to inspect the pole that fell," which request was denied and an exception noted. Whereupon the counsel took exceptions covering the portions of the charge quoted.

In view of the undisputed evidence in the record, which is given by the plaintiff and the witnesses for the defendant, this request was the exact equivalent of a request to charge that defendant did not owe to plaintiff the duty of excavating around the pole of the Rochester Gas & Electric Company and then testing the pole at the bottom of the excavation by an iron bar before allowing the plaintiff to ascend it. In no other way could an inspection be made according to the evidence, and it cannot be that one who must use the appliances of others that are in constant use and presumably inspected by them, must also make inspection or be mulcted in damages should injury result to someone in his employ. Such a claim assumes that a master has no right to trust any person or any agency; that although he must take his employe on a train with him to a point where he is erecting a building, still he must not trust to the inspection of the railroad company, although he knows it is their duty to inspect, but must himself inspect before he directs his employes to board the train; that, before he requires his workmen to enter an elevator to pass up to the ninth story of a building where he and they are engaged in decorating, he must make an inspection of the elevator; otherwise, in the event of an accident, a jury may be permitted to say that he failed in the performance of his duty to the servant, as was done in this case. The average human being would pronounce any such rule absurd, and would say that it is the duty of the *owner* of the elevator to see to it that it is inspected; it is not everybody's duty, nor the duty of anyone besides the owner. The progress of the world is founded upon trust and confidence, and the employer assumes and must assume that he who is charged with the performance of a duty will do it, and, as it is the duty of the owner of an elevator to have frequent and careful inspections, the public assume that the duty will be performed, and, therefore, enter the elevator in full confidence whenever occasion requires. And the employer is not negligent who, without special warning, trusts himself and his workmen within the elevator. But all

this is equally true of the electric light pole in this case. The Rochester Gas & Electric Company were charged with the duty of using reasonable and ordinary care to keep that pole in safe condition for the protection, at least, of passers-by upon the public streets, and this defendant, as well as all the rest of the public using that street, had the right to rely upon the company to perform that duty, and was not called upon first to doubt and second to trespass in a search for hidden defects where all appearances indicated soundness instead of rottenness.

But it is said that if we grant that the master be not liable in the case of the elevator because no authority can be found for it (which is equally true of this situation), a distinction can be drawn between such a case and the one at bar; for in the one the master is taking his men to work and in the other he has actually put them to work, and it is settled law that a master must use reasonable and ordinary care to provide a safe place for his men to prosecute their work in. *Flood v. W. U. Tel. Co.*, 4 Am. Electl. Cas. 402, 131 N. Y. 603. The suggestion is not that the one act is more reckless of the rights of employes than the other, but that a rule may be invoked and then applied which will make that which is a reasonably prudent act in fact an imprudent and negligent one in law. No such inconsistency can possibly result in the new situations which from time to time arise, if the courts but apply the rule according to both its letter and spirit—which do not require the master to insure his employes a safe place in which to work, but only that he shall use reasonable and ordinary care to accomplish that result. This court has so applied it from time to time in many cases, from among which the following are cited as illustrations: *Cullen v. Norton*, 126 N. Y. 1; *Perry v. Rogers*, 157 N. Y. 251; *Capasso v. Woolfolk*, 163 N. Y. 472; *DeVito v. Crago*, 165 N. Y. 378.

Recently the court reversed a judgment obtained against the owner of a building which fell during construction owing to defective execution by the contractor. *Burke v. Ireland*, 166 N. Y. 305; but, if the respondent's contention be sound, the person

engaged by the owner to do the plumbing would, under the rule requiring the master to use reasonable and ordinary care to provide a safe place for his workmen, be charged with the duty of inspection to see whether the contractor had properly constructed the foundation and, hence, chargeable in damages for injuries sustained by his men because of the fall of the building. No one has as yet presented such a claim to the court; but, if this charge is to stand as a correct exposition of the law, such claims will be presented in the future, for in the vast and varied works of construction, in which many independent contractors are engaged, each will naturally, and, in fact, must necessarily, rely upon the caution and care of others to guard against destruction of property and of life.

The learned counsel for the plaintiff has not been able to bring to the attention of the court a single case supporting the charge of the trial court. Indeed, the only cases to which he invites attention are the cases requiring inspection by railroad corporations of foreign cars received upon their roads as well as of their own cars. *Gottlieb v. N. Y., L. E. & W. R. R.*, 100 N. Y. 462; *Goodrich v. N. Y. C. & H. R. R. R.*, 116 N. Y. 398; *Eaton v. Same*, 163 N. Y. 391; *B. & P. R. R. v. Mackey*, 157 U. S. 72; *T. & A. R'y v. Archibald*, 170 U. S. 665. It is the law in this State that railroad corporations owe to their employes the duty of proper and frequent inspection of cars and their appliances for the purpose of discovering defects which may arise from use. *Bailey v. R., W. & O. R. R. R.*, 139 N. Y. 302. Proper inspection of the equipment and machinery of a train is itself part of the duty of the company. *Haskins v. N. Y., L. E. & W. R. R.*, 142 N. Y. 416. The rule is that if the appliances are not safe or proper on any of the cars they must not be put in the train and started out, and the cases cited simply hold that it makes no difference whether the cars belong to the company or some foreign corporation; they must first be inspected, and if found unsafe they must not be put in the train. That this is so will sufficiently appear from a brief ex-

tract taken from the opinion of Judge EARL in the Gottlieb case, which is first cited by respondent's counsel: "It (the railroad company) owes the duty of inspection as master, and is at least responsible for the consequences of such defects as would be disclosed or discovered by ordinary inspection. When cars come to it which have defects visible or discoverable by ordinary inspection, it must either remedy such defects or refuse to take such cars. So much, at least, is due from it to its employees. The employees can no more be said to assume the risks of such defects in foreign cars than in cars belonging to the company. As to such defects the duty of the company is the same as to all cars drawn over its road. A mere statement of the rule and the reason for it is sufficient without argument to show that those cases are not applicable in principle to the case in hand. There is no suggestion in those cases that the railroad company is responsible for the hidden defects in the foreign cars or the appliances when it undertakes to haul them over its road, but, instead, that it is responsible for those open and visible defects only which the ordinary train inspection will disclose, and so the rule simply commands that a company before it sends out a train shall have made an examination of the appliances of all cars for the purpose of disclosing open and visible defects readily discoverable by the ordinary system of inspection carried on by train hands, and requires that such inspection shall further be made as the train progresses on its route at such times and places as experience teaches to be necessary and the convenience of the service will permit.

The only cases brought to our attention that are closely enough related in their facts to this one to justify their consideration as authority are *Dixon v. W. U. Tel. Co.*, 6 Am. Electl. Cas. 803, 68 Fed. Rep. 630; *McIsaac v. Northampton El. L. Co.*, 172 Mass. 89, and *Flood v. W. U. Tel. Co.*, 4 Am. Electl. Cas. 402, 131 N. Y. 603. In Dixon's case the plaintiff, who was in the employ of a telegraph company, was engaged with others in stringing wires on its poles, and was instructed to climb a pole

of another company to get certain wires out of the way. The plaintiff climbed the pole by means of iron spikes driven into it, did his work and while descending fell, in consequence of one of the spikes being insufficiently secured or having become loosened by the rotting of the wood. It was held on demurrer to the complaint that the plaintiff could not recover, and in the course of the opinion the court said: "The employer is not an insurer of the safety and sufficiency of the tools, machinery or appliances furnished to the employe for his use, nor is he a guarantor of the safety of the place where or upon or about which the employe is required to work. The duty cast by law upon the employer is to use ordinary and reasonable care to furnish safe and sufficient tools, machinery and working places. If he has done this, he has performed the full measure of his duty. . . . The pole in question, however, did not belong to the defendant. The use of it was casual and incidental to the nature of the service in which the plaintiff was employed. In a large city, where telephone, telegraph, electric light and electric railway poles and wires are numerous, in the erection of new poles and wires it is often necessary to climb poles already erected in order to raise or remove wires which would interfere with the erection of additional poles and wires. It was a part of the plaintiff's duty to climb such poles and to raise and remove obstructing wires. . . . He learned, or he might have learned, when he went up the pole, whether the spikes were securely fastened in the wood. He saw and used them in going up, and a careful inspection, to insure his personal safety, was the first thing which ought to have been suggested to him. He knew that the pole he was about to climb did not belong to the defendant (and so the plaintiff in the case at bar knew that the pole he was about to climb did not belong to his employer), and that it could not know the condition of the spikes, further than its foreman could ascertain it by an inspection of them standing on the ground."

In McIsaac's case the plaintiff was employed by the defendant as a lineman and was injured by the breaking and falling of a

pole on which the defendant's wires were suspended. The pole was about 35 feet high, and the evidence tended to show that it was badly decayed a few inches below the surface of the ground, so that it broke off square with the strain upon it resulting from the plaintiff's weight and the force from the wires drawing upon it after other wires had been removed. Plaintiff was directed to go and take down from the pole two wires upon it which belonged to the defendant and put them on a new pole near by which had been erected there on account of a change of grade in the railroad at the crossing. The pole was of chestnut wood, about eight inches in diameter at the top and about fourteen inches at the surface of the ground. It had been set eight or nine years, and the evidence tended to prove that it showed no weakness or sign of decay about the ground. The opinion also indicates that the pole, while used by the defendant, belonged to another party. The entire court concurred in holding that the defendant did not owe to a lineman, whose business it was to work upon poles all along the line, as occasion might require, the duty of inspecting its poles below the ground and informing the lineman whenever any of them were so decayed as to be unsafe to work upon. KNOWLTON, J., in the course of his opinion, said: "The evidence was undisputed that it was easy to determine very quickly whether a pole was badly decayed a little below the surface of the ground, and that no skill or experience was required to do it beyond that which was possessed by ordinary linemen. The plaintiff testified that there were risks about the business with which he was familiar as a lineman. We think that one of the most common and obvious of these, in reference to which both he and his employer must have been presumed to have contracted when he entered the defendant's service, was the risk that some pole of uncertain age might break and fall when a lineman was working upon it, if he did not take measures to ascertain its condition before going upon it."

The court having reached the conclusion that the defendant was not liable even though it had owned the poles, said at the

close of its opinion that it was unnecessary, therefore, to consider "whether the general duty of the defendant to the plaintiff in regard to the strength of poles on which he was working is affected by the fact that it was not the owner of the pole that broke, but was merely using it in its business under the authority of the owner."

In *Flood v. Western Union Tel. Co.*, 4 Am. Electl. Cas. 402, 131 N. Y. 603, it is true that the pole was not the property of a third party, but belonged to the defendant, but even in that case a judgment in favor of plaintiff was reversed in this court where it was held that the plaintiff was not entitled to recover for fatal injuries sustained by the breaking of a crossarm on a telegraph pole precipitating him to the ground. Plaintiff's intestate was a lineman for the Western Union Telegraph Company and as such had frequent occasion to climb the poles and work about the arms. The arm in question when purchased was of the material, size and apparent strength of those in general use by telegraph companies. It was not discovered by the system of inspection which the defendant employed that there was anything about it indicating any defect or weakness. Six years of user and exposure to the elements, however, had so far weakened the arm that it failed to withstand the weight of plaintiff's intestate upon it, and it did not appear that during all that period of time the defendant had specially inspected that or any other arm for the purpose of ascertaining its strength. The defendant had inspectors who went along the line of telegraph poles and wires and carefully looked at them and tried the poles to see if they were still strong and adequate, and such inspectors were also provided with arms with which to replace defective ones, but the inspectors were not required to climb up every pole and examine the arms, and it did not appear that this pole had ever been climbed by any inspector for any such purpose. An important difference between that case and this, which makes more strongly for the defendant, is the fact that in this case the defendant was not the owner of the pole, but occupied it in part under a license

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from the owner who at the same time made use of it and retained the general control over it.

In cities many telephone companies string their wires upon the roofs of buildings under a similar license, but it would hardly be suggested by any one that thereby it became the duty of the company to inspect the stairs or attic ladder ascending to the roof in order to ascertain whether it would support the weight of the lineman.

Our conclusion is that a person who uses a pole, building, steamboat or other property of another as a mere licensee—such property remaining in the control and possession of the owner—is not bound to establish a system of inspection and repairs in regard to such property in order to protect his employes from injury because of a hidden defect only discoverable by a system of inspection involving the necessity of dominion over the property. It follows that the exceptions were well taken.

The judgment should be reversed and a new trial granted, with costs to abide the event.

O'BRIEN, LANDON and WERNER, JJ., concur with CULLEN, J.; GRAY and HAIGHT, JJ., concur with PARKER, Ch. J.

Judgment affirmed.

NOTE.—This single case has been selected to represent a large number of decisions in which is considered the relation of electrical companies to their employes, with respect to avoiding injury to the latter, from causes other than electric shock. As the decision is that of a bare majority of the court, the chief judge of which wrote a long dissenting opinion, both opinions are given.

The following is a memorandum of a few of the more important cases upon the same general subject:

In *McGorty v. Southern New England Teleph. Co.*, 69 Conn. 635, October 5, 1897, a telephone lineman, without making any examination of a pole which he was ordered to climb, and knowing that it was his duty first to examine the pole, and his privilege if he doubted its safety, to support it by appliances furnished by the company, without making any examination, but relying on the assurances of his fellow workmen, climbed the pole and was injured by its fall, held that he could not recover against his employer, the telephone company.

In *McIsaac v. Northampton Elec. Co.*, 172 Mass. 89, October 20, 1898, held that a lineman will be presumed to have assumed the risk of the breaking and falling of poles by reason of decay below the surface of the ground; also, that irrespective of custom, due care requires a lineman before going upon a pole, the apparent age of which is such as to make it probable that it is weak, to make inspection for decay just below the surface of the ground.

In *San Antonio Edison Co. v. Dixon*, 17 Tex. Civil Appeals 320, November 10, 1897, held, that a street railway company using the poles of another railway company for the stringing of its wires, is bound to use ordinary care in inspecting them, and that where one of its servants climbs such a pole, to remove the wires, and the pole breaks on account of a defect which was not apparent to the employee, the employer is liable.

In *Gibbons v. Brush Elec. Illum. Co.*, New York Supreme Court, Appellate Division, First Department, January, 1899 (36 App. Div. 140), a lineman, in the employ of an electric light company, while removing appliances from the top of one of its poles, was thrown to the ground and injured, being carried down with the appliance which he was in the act of removing. The means and place provided for his work were as reasonably safe as the nature and circumstances permitted. The work was done under the immediate supervision of a competent foreman, a fellow servant of the plaintiff, whose negligence, if that of any one, caused the accident. The plaintiff had been doing similar work for eighteen years, knew the old lamps were being taken down and new ones substituted, and was bound to assume that the frames might be disabled, and to govern his actions accordingly. Held, that under the circumstances, there was no ground upon which the liability of the company could be based.

In *Postal Tel. Cable Co. of Texas v. Ooots*, Texas Court of Civil Appeals, May 14, 1900 (57 S. W. Rep. 912), held that the employment of men to assist in the erection of telegraph poles, without making any inquiry as to their competency for such work, is negligent, and the employer is liable to a fellow servant for an injury resulting therefrom.

In *McDonald v. Postal Tel. Co.*, Rhode Island Supreme Court, May 28, 1900 (46 Atl. Rep. 409), an action brought by a lineman in the employ of a telegraph company, for damages for injuries caused by the breaking of a cross arm upon which plaintiff was working, it appeared that there was a knot in the cross arm, which was obvious to proper inspection, but being partly covered with paint and by an insulator, was not necessarily discernable by one whose only duty as an employe was not that of inspection, held, that the questions of negligence and contributory negligence were properly submitted to the jury; also, that an instruction to the jury that the defendant was bound to furnish a reasonably safe cross arm was not equivalent to saying that it insured the safety of the appliance; also that requests to charge as follows were properly refused: (1) That the defendant was not liable if it furnished a sufficient number of cross-arms from which workmen could select; or (2) if it employed competent workmen to inspect the cross arm; (3) that if the defect was visible, plaintiff was negligent and could not recover.

CITY OF RICHMOND V. SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY.

United States Supreme Court, May 22, 1899.

(174 U. S. 761.)

"TELEGRAPH" IN POSTROADS ACT DOES NOT INCLUDE "TELEPHONE."

Telephone companies are not entitled to the rights and privileges granted to telegraph companies by the postroads act of Congress of July 24, 1866. Cases of this series cited in opinion: *W. U. Tel. Co. v. Atty. General of Mass.*, vol. 2, p. 57; *St. Louis v. W. U. Tel. Co.*, vol. 4, p. 102; *Chesapeake & Pot. Teleph. Co. v. B. & O. Tel. Co.*, vol. 2, p. 416; *Wisconsin Teleph. Co. v. Oshkosh*, vol. 1, p. 687; *State, Duke, Pros. v. Cent. N. J. Teleph. Co.*, vol. 3, p. 546; *Cumberland Teleph. & Tel. Co. v. United Elec. Ry. Co.*, vol. 3, p. 408.

Messrs. Henry R. Pollard and C. V. Meredith, for appellant.

Messrs. Hill Carter, Addison L. Holliday, and George H. Fearons, for appellee.

Mr. Justice HARLAN delivered the opinion of the court: The principal question in this case is whether the Circuit Court and the Circuit Court of Appeals erred in holding that the appellee was entitled to claim the benefit of the provisions of the Act of Congress approved July 24th, 1866 entitled "An Act to aid in the Construction of Telegraph Lines, and to secure to the Government the Use of the Same for Postal, Military, and Other Purposes," 14 Stat., chap. 230.

By that act—the provisions of which are preserved in sections 5263 to 5268, inclusive, title LXV of the Revised Statutes of the United States—it was provided:

"Section 1. That any telegraph company now organized, or which may hereafter be organized, under the laws of any State in this Union, shall

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have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by act of Congress, and over, under, or across the navigable streams or waters of the United States: *Provided*, That such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads. And any of said companies shall have the right to take and use from such public lands the necessary stone, timber and other materials for its posts, piers, stations, and other needful uses in the construction, maintenance and operation of said lines of telegraph, and may pre-empt and use such portion of the unoccupied public lands subject to pre-emption, through which its lines of telegraph may be located as may be necessary for its stations, not exceeding forty acres for each station; but such stations shall not be within fifteen miles of each other.

"Sec. 2. That telegraphic communications between the several departments of the government of the United States and their officers and agents shall, in their transmission over the lines of any of said companies, have priority over all other business, and shall be sent at rates to be annually fixed by the Postmaster-General.

"Sec. 3. That the rights and privileges hereby granted shall not be transferred by any company acting under this act to any other corporation, association or person: *Provided*, however, that the United States may at any time after the expiration of five years from the date of the passage of this act, for postal, military, or other purposes, purchase all the telegraph lines, property, and effects of any or all of said companies at an appraised value, to be ascertained by five competent, disinterested persons, two of whom shall be selected by the Postmaster-General of the United States, two by the company interested, and one by the four so previously selected.

"Sec. 4. That before any telegraph company shall exercise any of the powers or privileges conferred by this act, such company shall file their written acceptance with the Postmaster-General, of the restrictions and obligations required by this act." 14 Stat. at L. 221, chap. 230.

Subsequently, by an act approved June 8th, 1872, all the waters of the United States during the time the mail was carried thereon; all railways and parts of railways which were then or might thereafter be put in operation; all canals and all plank roads; and all letter-carrier routes established, in any city or town for the collection and delivery of mail matter by carriers—were declared by Congress to be "post roads." 17 Stat. at L. 308, chap. 335. These provisions are preserved in section 3964 of the Revised Statutes of the United States.

By an act approved March 1st, 1884, "all public roads and highways, while kept up and maintained as such," were declared to be "post roads." 23 Stat. at L. 3, chap. 9.

Proceeding under an act of the legislature of New York of April 12th, 1848, and acts amendatory thereof, certain persons associated themselves on the 11th day of December, 1879, under the name of the Southern Bell Telephone & Telegraph Company. The articles of association stated that the general route of the line or lines of the company should be from its office in the city of New York, "by some convenient route through or across the States of New Jersey, Pennsylvania, Delaware, Maryland, and Virginia, or otherwise, to the city of Wheeling or some other convenient point in the State of West Virginia, and thence to and between and throughout various cities, towns, points and places within that part of the State of West Virginia lying south of the Baltimore & Ohio railroad, and within the States of Virginia, North Carolina, South Carolina, Georgia, Alabama, and Florida, the said line or lines to connect the said cities of New York and Wheeling together, and the said other cities, towns, points, and places, or some of them, or points within the same, together or with each other or with said cities of New York and Wheeling."

By an ordinance passed by the city of Richmond on the 26th day of June, 1884, it was provided: "1. Permission is hereby granted the Southern Bell Telephone & Telegraph Company to erect poles and run suitable wires thereon, for the purpose of telephonic communication throughout the city of Richmond, on the public streets thereof, on such routes as may be specified and agreed on by a resolution of the committee on streets, from time to time, and upon the conditions and under the provisions of this ordinance. 2. On any route conceded by the committee on streets, and accepted by the company, the said company shall, under the direction of the city engineer, so place its poles and wires as to allow for the use of the said poles by the fire alarm and police telegraph in all cases giving the choice of position to

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the city's wires, wherever it shall be deemed advisable by the council or the proper committee to extend the fire alarm and police telegraph over such route. 3. The telephone company to furnish telephone exchange service to the city at a special reduction of ten dollars per annum for each municipal station. 4. No shade trees shall be disturbed, cut, or damaged by the said company in the prosecution of the work hereby authorized without the permission of the city engineer and consent of the owners of the property in front of which such trees may stand, first had and obtained; and all work authorized by this ordinance shall be, in every respect, subject to the city engineer's supervision and control. 5. The ordinance may at any time be repealed by the council of the city of Richmond; such repeal to take effect twelve months after the ordinance or resolution repealing it becomes a law."

The Code of Virginia, adopted in 1887, sec. 1287, provided that "every telegraph and every telephone company incorporated by this or any other State, or by the United States, may construct, maintain, and operate its line along any of the State or county roads or works, and over the waters of the State, and along and parallel to any of the railroads of the State, provided the ordinary use of such roads, works, railroads, and waters be not thereby obstructed; and along or over the streets of any city or town, with the consent of the council thereof."

Under date of February 13th, 1889, the Southern Bell Telephone & Telegraph Company filed with the postmaster general its written acceptance of the restrictions and obligations of the above Act of July 24th, 1866.

The present suit was brought by that company in the Circuit Court of the United States against the city of Richmond.

The bill alleged that the plaintiff was engaged in the business of a "telephone" company, and of constructing, maintaining, and operating "telephone" lines in, through, and between the States of Virginia, West Virginia, North Carolina, South Carolina, Georgia, Alabama, and Florida; that it had been so en-

gaged for a period of about fifteen years, during which time it had continuously maintained at various places in said States and in Richmond, Virginia, an exchange, poles, wires, instruments, and all other apparatus and property necessary for the maintenance and operation of "telephones and telephone lines," and had erected and maintained through and along the certain streets and alleys of that city numerous poles and wires for conducting its business; that it had so conducted its business and erected and maintained its lines, wires, and poles under and by authority of the common council and board of aldermen of the city of Richmond, the legislature of Virginia, and acts of the Congress of the United States; that its "telephone" wires and poles were used by its subscribers in connection with the Western Union Telegraph Company under an agreement between the plaintiff and that company for the joint use of the poles and fixtures of both companies in sending and receiving messages; that its business was in part interstate commerce by reason of its connection with the telegraph company; and that its status was that of a telegraph company under the laws of the United States, and of the State of Virginia, and of other States of the United States, and that it was and is in fact chartered as a telegraph company under the general laws of New York.

The plaintiff also alleged that it had accepted the Act of Congress of July 24th, 1866; that by virtue of such acceptance it became entitled to construct, maintain, and operate lines of telephones over and along any of the military roads and post roads of the United States, which had then been or might thereafter be declared such by law; that the streets, alleys and highways of the city of Richmond are post roads of the United States; that the several departments of the government of the United States located in Richmond have used in that city the plaintiff's electrical conductors, and other facilities for the transmission of instructions, orders, and information to officers and persons in the administration of the governmental affairs, and on other business throughout the several States and the District of Columbia

and in foreign countries; that under and by virtue of the Virginia Code, section 1287, the plaintiff was authorized and empowered to construct, maintain, and operate its lines of poles and wires, with necessary facilities along and over the streets of any city or town in Virginia with the consent of the council thereof, and under and by virtue of the power and authority therein conferred, all of which was additional to the right given by the above Act of Congress, it maintained and operated its lines in the streets of the city of Richmond, and had in all respects complied with the legal obligations and requirements imposed; that relying upon its right to erect, maintain, and operate its lines along and over the streets and alleys of Richmond, it entered upon said streets and alleys and had conducted its business and executed its contracts, of which a large number were in force, to furnish and afford "telephonic" facilities to the residents of Richmond and to persons outside of the city of Richmond, and with the officers and agents of the Federal government; and that under the Act of Congress of 1866 it was and is entitled to maintain and operate its lines through and over the streets and alleys of the city of Richmond, "*without regard to the consent of the said city*, and it did in fact locate many of its poles and wires and begin the operation of its business *without applying to the said city for permission to do so.*"

The bill then referred to an ordinance of the city approved July 18th, 1891, and alleged that it was in conflict with the plaintiff's rights and void. It referred also to a subsequent ordinance of December 14th, 1894, repealing the ordinance of June 26th, 1884, granting the right of way through the city to the plaintiff, and providing "that in accordance with the fifth section of said ordinance all privileges and rights granted by said ordinance shall cease and be determined at the expiration of twelve months from the approval of this ordinance by the mayor."

Reference was also made in the bill to two ordinances passed September 10th, 1895, by one of which it was provided, among

other things: "1. That all poles now erected in the streets or alleys of the city of Richmond for the support of wires used in connection with the transmission of electricity, except such as support wires required by the city ordinances, to be removed and run in conduits, shall hereafter be allowed to remain only upon the terms and conditions hereinafter set forth. 2. No pole now erected for the support of telephone wires shall remain on any street in said city after the 15th day of December, 1895, unless the owner or user of such pole shall first have petitioned for and obtained the privilege of erecting and maintaining poles and wires for telephone purposes in accordance with the conditions of this ordinance, and such other conditions as the council may see fit to impose. And if such owner, failing to obtain such privilege as above required, shall neglect or fail to remove such pole or poles and telephone wires supported thereon from the streets or alleys of the city by the 20th day of December, 1895, and restore the street to a condition similar to the rest of the street or alley contiguous thereto, the said owner shall be liable to a fine of not less than five nor more than one hundred dollars for every such pole so remaining in the street or alley; to be imposed by the police justice of the city; each day's failure to be a separate offense."

By the other ordinance of September 10th, 1895, it was, among other things, provided: "The city council will grant permission to any company, corporation, partnership, or individual to place its wires and electrical conductors in conduit under the surface of said streets of the city; any such individual, partnership, corporation or company desiring such permission shall petition to the council therefor; such petition shall name the streets, alleys and the side and portions thereof to be used and occupied by such conduits, and shall submit maps, plans, and details thereof to accompany such petition."

The bill contains additional allegations—to the effect:

That the fifth section of the ordinance of 1884 was null and void; that the ordinances referred to were unreasonable, *ultra*

vires, and unconstitutional; that the plaintiff was entitled "*independent of and superior to the consent of the city of Richmond*," to "construct, maintain and operate" its lines "over and along" the streets of that city; that telephone companies and their business were embraced by the terms of the Act of Congress, and that, in fact, telephone and telegraph companies, were, for the purposes embraced by that act, one and the same; that the post roads spoken of in the act were not limited to routes on the public domain, but embraced all post roads of the United States that had been or might hereafter be declared such by Congress; that the streets and alleys of the defendant being post roads, the plaintiff had the right under the Act of Congress "to occupy the streets and alleys of the city of Richmond for its purposes, guaranteed to it by the constitution and laws of the United States, superior to any power in the said city to prevent it from so doing," and that it "claims not only the right to maintain its present poles and wires along the streets and alleys now occupied by it, but to extend them to other streets and alleys as its business and the business interests of the country and its patrons may require."

The city demurred to the bill of complaint, but the demurrer was overruled. 78 Fed. Rep. 858.

An answer was then filed which met the material allegations of the bill and the cause was heard upon the merits.

In the Circuit Court a final decree was entered in accordance with the prayer of the bill, as follows: "The court, without passing on the rights claimed by the complainant company under the laws of Virginia, and the ordinances of the city of Richmond, is of opinion and doth adjudge, order, and decree, that the complainant company has, in accordance with the terms and provisions and under the protection of the Act of Congress of the United States approved July 24th, 1866 (which is an authority paramount and superior to any State law or city ordinance in conflict therewith), the right "to construct, maintain, and operate its lines over and along" the streets and alleys of the

city of Richmond, both those now occupied by the complainant company and those not now so occupied, and to put up, renew, replace, and repair its lines, poles and wires over and along said streets and alleys, as well as to maintain, construct, and operate the same, and to connect its lines with new subscribers along said streets and alleys, and the said city of Richmond, its agents, officers, and all others are enjoined and restrained from cutting, removing, or in any way injuring said lines, poles, and wires of the complainant company, and from preventing or interfering with the exercise of the aforesaid rights by the complainant company, and also from taking proceedings to inflict and enforce fines and penalties on said company for exercising its said rights. And the court doth adjudge, order, and decree that the defendant do pay to the complainant its costs in this suit incurred to be taxed by the clerk, and this cause is ordered to be removed from the docket and placed among the ended causes, but with the liberty to either party hereto on ten days' notice to the other to reinstate this cause on the docket of this court, on motion, for the purpose of enforcing and especially defining, should it become necessary, their respective rights under this decree."

The city asked that the decree be modified by inserting therein after the words "construct and operate the same," the following words: "So far as to receive from and deliver to the Western Union Telegraph Company messages sent from beyond the limits of the State of Virginia or to be sent beyond the said limits," and by inserting therein after the words, "interfering with the exercise of the aforesaid rights by the complainant company," the following words: "So far as the reception from and delivery to the Western Union Telegraph Company of any messages sent from beyond the limits of the State of Virginia, or to be sent beyond said limits." But counsel for complainant objected, and the court (using the language of its order), "intending by said injunction to enjoin the city from interfering with the local business and messages, as well as those of an interstate character," refused to so modify the decree.

Upon appeal to the Circuit Court of Appeals, it was held that the plaintiff came within the protection and was entitled to the privileges of the Act of Congress of July 24, 1866; and that under that act it had the right to construct, maintain, and operate lines of telegraph over and along any of the post roads of the United States, and "when an effort is made, or threatened, to deal with it as a trespasser, it can refer to that act."

The Circuit Court of Appeals also held that the privileges so granted were to be enjoyed in subordination to public and private rights, and that the municipality could establish lawful provisions regulating the use of the highways mentioned in the act of Congress. "This being so," that court said, "the injunction granted by the Circuit Court is too broad in its language and effect. There should have been the recognition of a proper exercise of the police power by the municipal corporation and the use by the complainant of its poles and lines should have been declared to be subject to such regulations and restrictions as may now or may be hereafter imposed by the city council of Richmond, in the proper and lawful exercise of the police power." 42 U. S. App. 686, 697, 698.

The decree of the Circuit Court was reversed and the cause was remanded to that court with instructions to modify the terms of the injunction therein granted so as to conform to the principles declared in the opinion of the Circuit Court of Appeals. Judge BRAWLEY concurred in the result, but was not inclined to assent to so much of the opinion as held that a telephone company, such as was described in this case, and whose business was local in character, was within the purview of the Act of Congress of July 14th, 1866, relating to telegraph companies.

. The case is now before this court upon writ of certiorari.

The plaintiff's bill, as we have seen, proceeded upon the broad ground that it is entitled, in virtue of the Act of Congress of 1866, to occupy the streets of Richmond with its lines without the consent, indeed against the will, of the municipal authori-

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ties of that city. That, it would seem, is the ground upon which the decree of the Circuit Court rests; for it was declared by that court that the plaintiff had the right, under the provisions and protection of that act, to construct, maintain, and operate its lines over and along the streets and alleys of Richmond, both those then occupied by the plaintiff company and those not then so occupied, and to put up, renew, replace, and repair its lines, poles and wires over and along such streets and alleys, and to maintain, construct, and operate the same, as well as to connect its lines with the new subscribers along the streets and alleys of the city.

The Circuit Court of Appeals, while holding that the plaintiff was entitled to avail itself of the provisions of the Act of 1866—a question to be presently considered—adjudged that the rights and privileges granted by that act were to be enjoyed in subordination to public use and private rights, and subject to any lawful exercise of the police power belonging to the State or to one of its municipalities. This was in accordance with what this court had adjudged to be the scope and effect of the Act of 1866.

In *Western Union Telegraph Co. v. Massachusetts*, 2 Am. Electl. Cas. 57, 125 U. S. 530, 548, it was held that the Act of 1866 was a "permissive" statute, and that "it never could have been intended by the Congress of the United States, in conferring upon a corporation of one State the authority to enter the territory of any other State and erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the State into which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to its support."

In *St. Louis v. Western Union Telegraph Co.*, 4 Am. Electl. Cas. 102, 148 U. S. 92, 100, which involved the question whether a corporation proceeding under the Act of 1866 could occupy the public streets of a city without making such compensation as was reasonably required, it was said to be a misconcep-

tion to suppose that the franchise or privilege granted by the Act of 1866 carried "with it the unrestricted right to appropriate the public property of a State. It is like any other franchise, to be exercised in subordination to public as to private rights. While a grant from one government may supercede and abridge franchises and rights held at the will of its grantor, it cannot abridge any property rights of a public character created by the authority of another sovereignty. No one would suppose that a franchise from the Federal government to a corporation, State or national, to construct interstate roads or lines, of travel, transportation or communication, would authorize it to enter upon the private property of an individual, and appropriate it without compensation. No matter how broad and comprehensive might be the terms in which the franchise was granted, it would be confessedly subordinate to the right of the individual not to be deprived of his property without just compensation. And the principle is the same when, under the grant or franchise from the national government, a corporation assumes to enter upon property of a public nature belonging to a State. It would not be claimed, for instance, that under a franchise from Congress, to construct and operate an interstate railroad the grantee thereof could enter upon the State House grounds of the State, and construct its depot there, without paying the value of the property thus appropriated. Although the State House grounds be property devoted to public uses, it is property devoted to the public uses of the State, and property whose ownership and control are in the State, and it is not within the competency of the national government to dispossess the State of such control and use or appropriate the same to its own benefit or the benefit of any of its corporations or grantees, without suitable compensation to the State. This rule extends to streets and highways; they are the public property of the State. While for the purposes of travel and common use they are open to the citizens of every State alike, and no State can by its legislation deprive a

citizen of another State of such common use, yet when an appropriation of any part of this public property to an exclusive use is sought, whether by a citizen or a corporation of the same or another State, or a corporation of the national government, it is within the competency of the State, representing the sovereignty of that local public, to exact for its benefit compensation for this exclusive appropriation. It matters not for what the exclusive appropriation is taken, whether for steam railroads or for street railroads, telegraphs, or telephones, the State may, if it chooses, exact from the party or corporation given such exclusive use pecuniary compensation to the general public for being deprived of the common use of the portion thus appropriated."

But independently of any question as to the extent of the authority granted to "telegraph" companies by the Act of 1866, we are of opinion that the courts below erred in holding that the plaintiff, in respect of the particular business it was conducting, could invoke the protection of that act. The plaintiff's charter, it is true, describes it as a telephone and telegraph company. Still, as disclosed by the bill and the evidence in the cause, the business in which it was engaged and for the protection of which against hostile local action it invoked the aid of the Federal court, was the business transacted by using what is commonly called a "telephone," which is described in an agreement between the Western Union Telegraph Company and the National Bell Telephone Company in 1879, as "an instrument for electrically transmitting or receiving *articulate speech*."

Our attention is called to several adjudged cases in some of which it was said that communication by telephone was communication by telegraph. *Attorney General v. Edison Telephone Co.*, L. R. 6 Q. B. Div. 244, 255; *Chesapeake & Potomac Telephone Co. v. Baltimore & O. Telegraph Co.*, 2 Am. Electl. Cas. 416, 66 Md. 399; *Wisconsin Telephone Co. v. City of Oshkosh*, 1 Am. Electl. Cas. 687, 62 Wis. 32; *Duke v. Central New Jersey Telephone Co.*, 3 Am. Electl. Cas. 546, 53 N. J. L. 341; *Cumberland Telephone & Telegraph Co. v. United Electric*

Railway Co., 3 Am. Electl. Cas. 408, 42 Fed. Rep. 273. Upon the authority of those cases it is contended that the act of Congress should be construed as embracing both telephone and telegraph companies.

The English case was an information filed for the purpose of testing the question whether the use of certain apparatus was an infringement of the exclusive privilege given to the postmaster general by certain acts of Parliament as to the transmission of "telegraphs." The court held that the postmaster general was entitled, looking at the manifest objects of those acts and under a reasonable interpretation of their words, to the exclusive privilege of transmitting messages or other communications by any wire and apparatus connected therewith used for telegraphic communication, or by any other apparatus for communicating information by the action of electricity upon wires. The Maryland case involved the question whether a company organized under a general incorporation law of Maryland was authorized to do a general telephone business. In the Wisconsin case some observations were made touching the question whether telephone companies, although not specifically mentioned in a certain general law of that State, could be incorporated with the powers given to telegraph companies by that statute, which, as the report of the case shows, authorized the formation of corporations for the purpose of building and operating telegraph lines or conducting the business of telegraphing in any way, "or for any lawful business or purpose whatever." The New Jersey case involved the question whether a company organized under the act of that State to incorporate and regulate telegraph companies was entitled to operate and condemn a route for a telephone line. The last case involved the rights of a telephone company under statutes of Tennessee, one of which related in terms to telegraph companies, and the other authorized foreign and domestic corporations to construct, operate, and maintain such telegraph, telephone, and other lines necessary for the speedy transmission of intelligence along and over

the public ways and streets of the cities and towns of the State. It was held in that case that a telephone company under its right to construct and operate a telegraph was empowered by statute to establish a telephone service. None of those cases involved a construction of the Act of Congress; and the general language employed in some of them cannot be regarded as decisive in respect to the scope and effect of that act, however pertinent it may have been as to the meaning of the particular statutes under examination.

It may be that the public policy intended to be promoted by the Act of Congress of 1866 would suggest the granting to telephone companies of the rights and privileges accorded to telegraph companies. And it may be that if the telephone had been known and in use when that act was passed, Congress would have embraced in its provisions companies employing instruments for electrically transmitting articulate speech. But the question is, not what Congress might have done in 1866, nor what it may or ought now to do, but what was in its mind when enacting the statute in question. Nothing was then distinctly known of any device by which articulate speech could be electrically transmitted or received between different points, more or less distinct from each other, nor of companies organized for transmitting messages in that mode. Bell's invention was not made public until 1876. Of the different modes now employed to electrically transmit messages between distinct points, Congress in 1866 knew only of the invention then and now popularly called the telegraph. When, therefore, the Act of 1866 speaks of telegraph companies, it could have meant only such companies as employed the means then used or embraced by existing inventions for the purpose of transmitting messages merely by sounds of instruments and by signs or writings.

In 1887, the postmaster general submitted to the attorney general the question whether a telephone company or line, offering to accept the conditions prescribed in title LXV of the Revised Statutes (being the Act of 1866), could obtain the

privileges therein specified. Attorney General Garland replied: "The subject of title LXV of Revised Statutes is telegrapha." In all its sections the words "telegraph," "telegraph company," and "telegram" define and limit the subject of the legislation. When the law was made, the electric telegraph, as distinguished from the older forms, was what the lawmakers had in view. The electric telegraph when the law was made, as to the general public, transmitted only written communication. Its mode of conduct is yet substantially the same. This transmission of written messages is closely analogous to the United States mail service. Hence the acceptance of the provisions of the law by the telegraph company was required to be filed with the postmaster general, who has charge of the mail service. Under the several sections embraced in the title, in consideration of the right of way and the grant of the right to pre-empt 40 acres of land for stations at intervals of not less than 15 miles, certain privileges as to priority or right over the line, also the right to purchase, with power to annually fix the rate of compensation, were secured to the government. Governmental communications to distant points are almost all, if not all, in writing. The useful government privileges which formed an important element in the legislation would be entirely inapplicable to telephone lines, by which oral communications only are transmitted. A purchase of a telephone line certainly was not in the mind of the lawmakers. In common and technical language alike, telegraphy and telephony have different significations. Neither includes all of the other. The science of telegraphy as now understood was little known to practical utility in 1866, when the greater part of the law contained in the title was passed. Telephone companies, therefore, are not within the "category of the grantees of the privileges conferred by the statute." If similar privileges ought to be granted to telephone companies, such a grant would come within the scope of legislative rather than administrative power." 19 Ops. Atty. Gen. 37.

It is not the function of the judiciary, because of discoveries after the Act of 1866, to broaden the provisions of that act so

that it will include corporations or companies that were not, and could not have been at that time, within the contemplation of Congress. If the act be construed as embracing telephone companies, numerous questions are readily suggested. May a telephone company, of right, and without reference to the will of the States, construct and maintain its wires in every city in the territory in which it does business? May the constituted authorities of a city permit the occupancy only of certain streets for the business of the company? May the company, of right, fill every street and alley in every city or town in the country with poles on which its wires are strung, or may the local authorities forbid the erection of any poles at all? May a company run wires into every house in a city, as the owner or occupant may desire, or may the local authorities limit the number of wires that may be constructed and used within its limits? These and other questions that will occur to every one indicate the confusion that may arise if the Act of Congress relating only to telegraph companies, be so construed as to subject to national control the use and occupancy of the streets of cities and towns by telephone companies, subject only to the reasonable exercise of the police powers of the State. But even if it were conceded that no such confusion would probably arise, it is clear that the courts should not construe an act of Congress relating in terms only to "telegraph" companies as intended to confer upon companies engaged in telephone business any special right in the streets of cities and towns of the country, unless such intention has been clearly manifested. We do not think that any such intention has been so manifested. The conclusion that the act of 1866 confers upon telephone companies the valuable rights and privileges therein specified is not authorized by any explicit language used by Congress and can be justified by implication only. But we are unwilling to rest the construction of an important act of Congress upon implication merely; particularly if that construction might tend to narrow the full control always exercised by the local authorities of the States over streets and

alleys within their respective jurisdictions. If Congress desires to extend the provisions of the Act of 1866 to companies engaged in the business of electrically transmitting articulate speech,—that is, to companies popularly known as telephone companies, and never otherwise designated in common speech,—let it do so in plain words. It will be time enough when such legislation is enacted to consider any questions of constitutional law that may be suggested by it.

Something was said in argument as to the power of Congress to control the use of streets in the towns and cities of the country. Upon that question it is not necessary to express any opinion. We now adjudge only that the Act of 1866, and the sections of the Revised Statutes in which the provisions of that act have been preserved, have no application to telephone companies whose business is that of electrically transmitting articulate speech between different points.

What rights the appellee had or has under the laws of Virginia and the ordinances of the city of Richmond is a question which the Circuit Court did not decide, but expressly waived. It is appropriate that said question should first be considered and determined by the court of original jurisdiction.

The decree of the Circuit Court of Appeals so far as it reverses the decree of the Circuit Court is affirmed, and the cause is remanded with directions for such further proceedings in the Circuit Court as may be in conformity with the principles of this opinion and consistent with law. It is so ordered.

NOTE.—The foregoing decision of the highest tribunal in this country is at variance with all the reported cases which have come to the editor's attention, in which the question has arisen whether the word "telegraph," as used in statutes, included "telephone;" although, as stated by the court in the above opinion, the particular statute in question had been construed in no other case, in that particular. In addition to the cases cited in the opinion above, "telegraph" was construed to include "telephone" in *Commonwealth v. Penna. Teleph. Co.*, 1 Am. Electl. Cas. 863, note; *Iowa Union Teleph. Co. v. Board of Equalization*, 1 id. p. 799; *St. Louis v. Bell Teleph. Co.*, 2 id. p. 44; *Bell Teleph. Co. of Phila. v. Com.*, 2 id. 407; *Franklin v. N. W. Teleph. Co.*, 2 id. 439; *Roberts v. Wisconsin Teleph. Co.*, 3 id. 471;

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Cent. Pa. Teleph. & Supply Co. v. Wilkesbarre, &c. Ry. Co., 4 id. 260; *Hudson River Teleph. Co. v. Waterliet, &c. Ry. Co.*, 4 id. 275; *Gulf, &c. Ry. Co. v. S. W. Tel. & Teleph. Co.* (Texas), 45 S. W. 151, 61 S. W. 406; *S. W. Tel. & Teleph. Co. v. Gulf, &c. Ry. Co.*, 52 S. W. 106; *Davis v. Pacific Teleph. & Tel. Co.* (Cal.), 59 Pac. 698; *Dolbear v. Teleph. Co.*, 128 U. S. 1.

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Missouri Supreme Court, Division Two, Feb. 12, 1901.

(160 Mo. 59.)

CONSTITUTIONALITY OF ACT REQUIRING SCREENS TO PROTECT MOTORMEN—
SUFFICIENCY OF INFORMATION.

The statute, Acts 1897, page 102, entitled "An Act requiring persons, associations and corporations, owning or operating street cars to provide for the well-being and protection of employes;" and providing (1) "that every electric street car, other than trail cars, which are attached to motor cars, shall be provided during the months of November, December, January, February and March of each year, at the front end, with a screen composed of glass or other material which shall fully and completely protect the driver, motorman, gripman or other person stationed on such front end and guiding or directing said car from wind and storm;" and (2) imposing upon any person, agent or officer of any association or corporation violating the act, punishment, as for a misdemeanor, upon conviction, in a fine of not less than \$25 nor more than \$100 for each day that any car belonging to or used by such person, association or corporation is permitted to remain unprovided with such screen; also providing that the prosecuting attorney should enforce the act, and be entitled to one-fourth the fine recovered.

Held, (1) that the act is not so indefinite and uncertain in its meaning as to be inoperative; (2) that the act is not unconstitutional because the title gives no indication of the character of the act; or (3) as special legislation; or (4) as imposing cruel and unusual punishment; or (5) as depriving of life, liberty or property without due process of law, *e. g.*, depriving motormen of their liberty of contract.

Held, that the provision giving part of the fine to the prosecuting attorney was unconstitutional, but the rest of the act was not thereby invalidated. The information ran against the president and general manager of an electric railway company, and charged not the defendants, but the com-

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pany itself, with the unlawful ownership and operation of cars without screens. *Held*, fatally defective, and judgment of conviction reversed. Cases of this series cited in opinion: *State v. Nelson*, vol. 5, p. 619; *State v. Hoskins*, vol. 5, p. 614.

Appeal from St. Louis Court of Criminal Correction; William H. CLARKE, Judge.

Edwards Whitaker was convicted of violating Act March 5, 1897, and appeals. Reversed.

Boyle, Priest & Lehmann and *George W. Easley*, for appellant.

Edward C. Crow, Attorney General, and *Sam. B. Jeffries*, Assistant Attorney General, for the State.

GANTT, J.: This is an appeal from a judgment of conviction by the St. Louis Court of Criminal Correction for an alleged violation of the Act of March 5, 1897, entitled "An act requiring persons, associations, and corporations, owning or operating street cars to provide for the well-being and protection of employes" (Acts 1897, p. 102). The information was in these words:

"In the St. Louis Court of Criminal Correction. St. Louis, Mo., January 19th, 1900. State of Missouri, Plaintiff, v. Edwards Whitaker and Jilson J. Coleman. Charged with failure to provide screen for front end of electric street car. Richard M. Johnson, assistant prosecuting attorney of the St. Louis Court of Criminal Correction, now here in court, on behalf of the State of Missouri, information makes as follows: That Edwards Whitaker is the president, agent, and officer of the St. Louis Transit Co., and Jilson J. Coleman is the general manager, agent, and officer of the St. Louis Transit Co., which said company is a corporation duly organized under and by virtue of the laws of the State of Missouri, and as such, at the date hereinafter named, owned, operated, and constructed a line of street railway in the said city of St. Louis and State of Missouri, operated by the motive power of electricity; that on the 1st day

of November, and upon every day in November, 1899, and upon the 1st day of December, 1899, and on the 1st day of January, 1900, and every day up to the filing of this information in said month, and on the 18th day of January, 1900, said corporation, through and by said Edwards Whitaker, its president, agent, and officer, and Jilson J. Coleman, its general manager, agent, and officer, did willfully, knowingly, and unlawfully operate an electric street car, which was not a trail car, attached to a motor car upon its lines, to wit, on the Mound City Line, electric car No. 259, while said electric car was not provided at the front end with a screen composed of glass or other material, which fully and completely protected the motorman of said electric car, or other person stationed on the front end of said car, from wind and storm while said motorman, or other person, was guiding and directing said car; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State. Richard M. Johnson, Assistant Prosecuting Attorney of the St. Louis Court of Criminal Correction.

"State of Missouri, City of St. Louis—ss.: Richard M. Johnson, being duly sworn, upon his oath says that the facts stated in the above information are true. Richard M. Johnson."

"An Act requiring persons, associations and corporations, owning or operating street cars to provide for the well-being and protection of employes.

"Be it enacted by the General Assembly of the State of Missouri, as follows:

"Section 1. That every electric street car, other than trail cars, which are attached to motor cars, shall be provided during the months of November, December, January, February and March of each year, at the front end, with a screen composed of glass or other material which shall fully and completely protect the driver, motorman, gripman or other person stationed on such front end and guiding or directing said car from wind and storm.

"Sec. 2. Any person, agent or officer of any association or corporation violating any of the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in a sum not less than twenty-five dollars or more than one hundred dollars for each day that any car belonging to or used by such person, association or corporation is permitted to remain unprovided with the screen required by section 1 of this act.

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And it is hereby made the duty of the prosecuting attorney of each county in the State to enforce the provisions of this act, for which he shall be entitled, in addition to his ordinary fee or salary, to one-fourth of the fine recovered. Approved March 5, 1897."

Acts 1897, p. 102.

The defendant moved to quash on the following grounds:

"First. Because the said information does not state facts showing that the defendants, or either of them, are guilty of any offense against the laws of Missouri.

"Second. Because the act of the legislature upon which the information is predicated is unconstitutional and void, in that: (1) The subject of the act is not clearly, or at all, expressed in its title, as required by section 28 of article 4 of the constitution of Missouri. (2) Said act is special legislation, and contravenes section 53, art. 4, of the constitution of Missouri. (3) Said act imposes excessive fines and inflicts cruel and unusual punishment, and thereby contravenes sections 24, 25, art. 2, of the constitution of Missouri. (4) Said act gives to the prosecuting attorney 'one-fourth of the fine recovered,' and thereby contravenes section 8, art. 11, of the constitution of Missouri. (5) Said act undertakes to punish the defendants for the alleged wrong and default of another, and deprives the corporation owning the car of the right to contract with its motormen for the operation of cars without screens, and deprives the motorman of the right to contract to operate such cars without screens, and also of the right to waive the presumed benefits to such motorman sought by said act, and thereby contravenes section 30, art. 2, of the constitution of Missouri.

"Third. Because that the said act is in contravention of section 1, art. 14, of amendments to the constitution of the United States, in that it denies to the corporation and its employes the right to contract as to the use of cars without screens, and in that it singles out from all other classes of street cars electric cars, and requires only the owners of electric cars to screen the front end thereof, and thereby denies to the motorman, gripman, and drivers of all other street cars the equal protection of

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the laws with motormen of electric cars, and also denies to the owners and operators of electric cars the equal protection of the laws, in that it imposes a burden on them not imposed upon the operators of any other class of street cars.

"Fourth. Because said act is unreasonable and unjust in its provisions, and it was and is beyond the power, authority, or jurisdiction of the general assembly of Missouri to enact under the constitution and laws of the State."

The court denied the motion to quash, and defendants excepted. On the 22d day of June, 1900, the State dismissed as to defendant Coleman, and on the same day the case was tried as to defendant Whitaker on the following statement of facts: "(2) That the St. Louis Transit Company was, at the time mentioned in the information, and ever since has been, and it still is, a street-railway corporation of the city of St. Louis. (b) That the defendant Edward S. Whitaker was at the times mentioned in said information, ever since has been, and still is, president of the St. Louis Transit Company. (c) That between the beginning of the month of November of the year 1899 and the end of March of the year 1900 the St. Louis Transit Company operated an electric street car, other than a trail car attached to a motor car, which was not provided with a screen composed of glass or other material, which fully or completely protected the motorman or other person stationed at the front end of said car, guiding or directing said car, from wind and storm. That said cause shall be submitted upon the facts stated in this stipulation, but nothing herein contained shall be construed as a waiver by the defendant Whitaker of the objections made to the sufficiency and legality of said information in and by the motion heretofore filed by said defendant to quash said information, nor to deprive the defendant of the right to appeal this case."

The defendant then prayed the court to give the following declarations of law: "First. Admitting all the evidence offered by the State to be true, it is not sufficient to authorize the

finding of the defendant guilty, and he must be found not guilty. Second. It is not sufficient for the State to show that the electric street cars named in the information and the stipulation of facts filed in the cause belonged to or were used by the St. Louis Transit Company, and were by it permitted to remain without the screens or vestibules named in the first section of the act of March 5, 1897, but, before the defendant can be found guilty, the State must prove beyond a reasonable doubt that such car or cars belonged to or were used by the defendant Whitaker. Third. The fact that the St. Louis Transit Company may have violated the statute in regard to operating cars without screens, and that the defendant was president of said company at the time of the violation of such statute, is not sufficient to prove the guilt of the defendant; and, in the absence of proof showing some participation of the defendant in the operation of said cars, or knowledge of defendant that the statute was being violated, the defendant must be found not guilty." Each of said declarations was refused by the court, and the defendant saved exceptions. The court found defendant guilty, and assessed his fine at \$25. After an unsuccessful motion for a new trial, he appealed to this court.

1. It is urged that the act of March 5, 1897, is so indefinite and uncertain in its meaning that it must be inoperative for that if no other reason. Learned counsel insist that the act does not impose the duty upon any one to provide the screens with which the act commands every electric car shall be provided during the months of November, December, January, February, and March of each year, to protect the motorman, gripman, or other person stationed at the front end of and guiding said car from wind and storm. While the act is obnoxious to verbal criticism, we think it quite plainly imposes upon every electric car company or association of persons operating electric cars the duty of providing screens on their cars in the winter months named for the protection of their motormen. Such, we take it, was the plain intent of the legislature.

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As was said by MOORE, C. J., in *Russell v. Farquhar*, 55 Tex. 355: "While it is for the legislature to make the law, it is the duty of the courts to 'try out the right intendment' of statutes upon which they are called to pass, and by their construction to ascertain and enforce them according to their true intent." "For it is this intent which constitutes and is in fact the law, and not the mere verbiage used by inadvertence or otherwise to express its intent, and to follow which would prevent that intent." This is a remedial as well as penal statute, and should be fairly construed; i. e., it is to be construed with reference to the subject of the act and its purposes. So read, we think it obviously imposed upon the corporation or person owning or operating electric cars the duty of providing said cars with screens; indeed, it is not susceptible of any other reasonable construction. It not infrequently happens that one portion of a statute is construed to be remedial and another part of it as penal. It is somewhat more difficult to construe the second section. The language is, "any person, agent or officer of any association or corporation violating any of the provisions of this act shall be deemed guilty of a misdemeanor," etc. Having construed the first section to require the corporation, association, or person owning the car to equip it with the screen required by the act, we think the statute makes it penal for "any person" who owns or operates an electric railroad car to operate such cars without the screens required by the statute, and any agent or officer of any association or corporation operating or owning such cars who violates said act is also punishable under the act; and by such "agent or officer" is meant one whose duty it is to see said cars are provided with said screens before they are operated; not the motorman for whose protection the act was passed. The managing executive officers represent the corporation or association, and the law will presume they know whether the cars operated under their direction are provided as the statute requires, and hold them responsible for operating them without first complying with the statute. For the purpose of arriving at the

intention of the general assembly we may look to the title of the act, and, so doing, and reading that and every part of the act together, we think the foregoing is the true construction of the act. It is not necessary, in charging a misdemeanor like this, to aver that it was knowingly committed. *Howell v. Stewart*, 54 Mo. 409.

2. Passing now to the next objection,—that the act is unconstitutional because the title gives no indication of the character of the act itself,—we think it untenable. Sound policy and legislative convenience dictate a liberal construction of the title and the subject-matter of statutes to maintain their validity. Infraction of this constitutional clause must be plain and obvious, to be recognized as fatal. This has been the uniform rule of construction of this provision of our constitution. It is only necessary that the title shall indicate the subject of it in a general way without entering into details. All auxiliary provisions properly attaching to the main subject, and constituting with it one whole, may be embraced within the enactment. *State v. Bockstruck*, 136 Mo. 335; *State v. Bronson*, 115 Mo. 271; *State v. Marion Co. Ct.*, 128 Mo. 427. Measured by these and numerous other adjudications of this court, the title to this act was both definite and broad enough to include the provisions of this act, all of which were germane to the purpose expressed.

3. It was strenuously contended on the argument as well as in the brief that the act is offensive to the provision of our constitution which ordains that no local or special law shall be enacted "when a general law can be made applicable." Section 53, art. 4, Const. The insistence is that it is special legislation, because it only applies to electric cars, and is enacted for the protection of a particular class, to wit, motormen on electric cars, whereas by a general law the legislature could have provided for the protection and well-being of all street-car drivers, gripmen, and motormen as well as for one kind only, to wit, motormen of electric cars, who constitute particular per-

sons of a general class of laborers. As the postulate of this argument it is assumed that this classification is purely arbitrary. But is it so? This act applies throughout the State, in every town and city in which cars are propelled by electricity, and to all motormen who guide them. Learned counsel in argument conceded the soundness of the decision of the Supreme Court of Minnesota in *State v. Hoskins* and *State v. Smith*, 5 Am. Electl. Cas. 614, 59 N. W. 545, in which that court sustained the constitutionality of an act like this, which did not apply to mule or horse street cars, as being based upon a perfectly rational distinction between the duties of a driver of a horse car and a motorman on a cable or electric car, but argued that, had the act been restricted as is this act to electric cars, the ruling would have been different. We do not so construe that decision. It is true that the court assumed in that case that the gripman could be boxed in without impairing his power of control, but the only question on that record was whether the act was class legislation because it did not include horse cars, and it was held not to be. It did not hold that it was not competent for the legislature to make a distinction between electric cars and cable cars. The Supreme Court of Ohio in *State v. Nelson*, 5 Am. Electl. Cas. 619, 39 N. E. 22, met the exact question by holding that a court could not judicially know that a cable car or a horse car is so constructed and operated as to require the same means of protection for operatives as is required on electric cars; and, as the courts could only judge of the operation of a statute through facts of which they can take judicial notice, it refused to hold a similar statute unconstitutional. Learned counsel urge, however, that courts "are not required to shut their eyes to matters of common knowledge or things in common use." Conceding this, it is not generally known that on a cable car the gripman stands back near the center of the car, in a box which protects the lower half of his body, and is protected by the roof of the car in rainy, or snowy weather, and that this grip car is constantly used by passengers in getting on

and off the train, whereas the motorman on an electric car stands in front, with his attention necessarily given to the means of controlling the motive power and the brake, and is much more exposed to the cold and inclement weather of our winters than the gripman on the cable car; and are we to assume the legislature did not consider this difference, or their finding that there was such a distinction was contrary to the fact beyond a reasonable doubt? We think not. It cannot be questioned that in the exercise of its police power the legislature may enact laws to protect the health and safety of our citizens by all reasonable regulations, and, when a given subject is within that power, the extent to which it is to be exercised is within the discretion of the legislature. It is not insisted that it is not a wise and most humane provision for the protection of those whose avocation requires them to stand in front of a rapidly moving car on a bitter cold day, often with the mercury below zero, but merely that it does not apply to all who may suffer in similar callings. We think the legislature had the right to make the classification it did, and we have no power to hold it contravened the constitution in so doing.

4. The charge that the act imposes cruel and unusual punishment is without merit. Every statute imposing a fine might, by the same token, be held cruel and unusual punishment. The way to avoid the cruelty is to obey the law, and avoid these accumulated fines.

5. Counsel concede that the provision granting the prosecuting attorney one-fourth of the fines to be recovered does not invalidate the whole act. Clearly, that provision offends against the constitution, which requires the whole to be paid into the school fund, and so the courts would require.

6. Again, it is said that the act is contrary to section 30 of article 2 of the constitution of Missouri, which provides "that no person shall be deprived of life, liberty or property without due process of law." Inasmuch as this is a public prosecution by the State of an offense against the public, it is difficult to

discern the relevancy of the argument and decisions to the effect that this statute deprives the motormen on electric cars of their liberty of contract. The premise upon which the argument is based is not true. It is not true that this act was not designed to protect the public health. This is not only its professed purpose, but the body of the act confirms it. It is a plain, just, and commendable police regulation. The State has an interest in the health of its citizens, and the preservation of their lives and manhood, and such is the obvious, unmistakable purpose of the act under consideration. Not only has the State a direct interest in the health of the motormen, but in the passengers, whose lives and limbs may be imperiled if the motormen are allowed to become benumbed from exposure. As this record does not contain any facts upon which we could properly decide the effect of a waiver by a motorman of his right to the protection secured to him by this act, we must decline a further discussion of this point. We are clear that this act in no manner contravenes this section of our constitution nor the fourteenth amendment to the Federal constitution.

7. But, notwithstanding we hold the act to be valid, the judgment must be reversed because the information does not charge the defendant, but the corporation, the St. Louis Transit Company, with knowingly and unlawfully operating its cars without having provided screens thereon as required by the act. This is a pleading in a criminal case, and it does not charge the defendant either with the ownership or the operation of the car. The sufficiency of the information was challenged in that respect by the motion to quash and in the motion in arrest of judgment. For the insufficiency of the information to charge defendant with the offense denounced in the statute, the judgment must be and is reversed.

SHEERWOOD, P. J., and BURGESS, J., concur.

IN RE STORTI.

Massachusetts Supreme Judicial Court, May 7, 1901.

ELECTROCUTION—CONSTITUTIONAL LAW.

The Massachusetts Electrocution Law, Statutes 1898, chapter 326, section 6, is not in conflict with article 26 of the Declaration of Rights, which prohibits the infliction of cruel or unusual punishment.

Cases of this series cited in opinion: *People ex rel. Kemmler v. Durston*, vol. 3, p. 834; *People v. Kemmler*, vol. 3, p. 841, note; *In re Kemmler*, vol. 3, p. 842.

Case reserved from Supreme Judicial Court, Suffolk county.

W. M. Stockbridge and *C. W. Rowley*, for petitioner.

F. H. Nash, Assistant Attorney-General, for the Commonwealth.

HOLMES, C. J.: These proceedings are respectively a writ of error and a petition for a writ of *habeas corpus*. Both are intended to raise the same issue, that the punishment, death by electricity, to which the said Storti has been sentenced, under St. 1898, c. 326, sec. 6, is "cruel or unusual" within article 26 of the Massachusetts declaration of rights. Upon the writ of error, the plaintiff in error insisting that the assignment was of error in fact, evidence was heard, the plaintiff in error being brought into court by *habeas corpus* to be present at the hearing, and the presiding justice found that the assignment was not true. The independent petition for *habeas corpus* was reserved by agreement of parties for hearing by the full court at the same time with the writ of error.

In the view which we take of the case it is unnecessary to consider any question of procedure, either as between the two

proceedings adopted or as to matters of detail arising under each. We therefore pass all such matters on one side. It also is unnecessary to consider whether the before mentioned article of our declaration of rights is to be limited in its application to the action of magistrates so far as they are left to themselves and the common law, or whether it is to be taken to embody a large general principle equally binding upon all branches of the government, or at least binding upon magistrates and courts of law even when the legislature has undertaken to establish a punishment by its act. Finally, it is unnecessary to go into any nice argument upon the words of the article, and to decide whether, inasmuch as those words are "cruel or unusual," not "cruel and unusual," a punishment which is unusual, but is not cruel, is forbidden by them.

Taking all the preliminaries most favorable for the prisoner, we are clearly of opinion that the constitution is not contravened by the act, and we render our opinion at once that we may avoid delaying the course of the law and raising false hopes in his mind. The answer to the whole argument which has been presented is that there is but a single punishment, death. It is not contended that if this is true the statute is invalid, but it is said that it is not true, and that you cannot separate the means from the end in considering what the punishment is, any more when the means is a current of electricity than when it is a slow fire. We should have thought that the distinction was plain. In the latter case the means is adopted not solely for the purpose of accomplishing the end of death but for the purpose of causing other pain to the person concerned.

The so-called means is also an end of the same kind as the death itself, or in other words is intended to be a part of the punishment. But when, as here, the means adopted are chosen with just the contrary intent, and are devised for the purpose of reaching the end proposed as swiftly and painlessly as possible, we are of opinion that they are not forbidden by the constitution, although they should be discoveries of recent science,

and never should have been heard of before. Not only is the prohibition addressed to what in a proper sense may be called the punishment, but, further, the word "unusual" must be construed with the word "cruel," and cannot be taken so broadly as to prohibit every humane improvement not previously known in Massachusetts. *People ex rel. Kemmler v Durston*, 3 Am. Electl. Cas. 834, 119 N. Y. 569, 24 N. E. 6, 7 L. R. A. 715; *In re Kemmler*, 3 Am. Electl. Cas. 842, 136 U. S. 436, 10 Sup. Ct. 930, 34 L. Ed. 519.

The suggestion that the punishment of death, in order not to be unusual, must be accomplished by molar rather than by molecular motion seems to us a fancy unwarranted by the constitution.

No doubt a means might be adopted which, although adopted only as a means, practically would be part of the punishment and would have to be considered as such. But such a case is not presented by a means chosen precisely because it is instantaneous. There was a hint at an argument based on mental suffering, but the suffering is due not to its being more horrible to be struck by lightning than to be hanged with the chance of slowly strangling, but to the general fear of death. The suffering due to that fear the law does not seek to spare. It means that it shall be felt.

Some criticism was addressed to minor details of the law. The provision that after delivery to the warden of the State prison the prisoner shall be kept in a special cell and only certain persons allowed access to him without an order of the court does not prevent, and by its true construction is not intended to prevent, the presence of the prisoner in court in any matter which properly still may be brought up in court, and which by the course of law or treaty may require his presence (see *Com. v. Cody*, 165 Mass. 133, 138, 42 N. E. 575), as was exemplified in this case.

Leaving it to the warden to select the day of the week appointed by the court for the execution was not intended to ag-

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gravate the prisoner's distress by enhancing his suspense. The purpose is humane, and the possible uncertainty for a brief period as to the exact time is not a part of the punishment. See, further, *Com. v. Costley*, 118 Mass. 1, 35. Judgment to stand. Writ of *habeas corpus* denied.

NOTE.—The only other adjudications upon the constitutionality of electrocution laws, are the decisions of the New York Court of Appeals and Supreme Court of the United States, both cited in the foregoing opinion.

READFIELD TELEPHONE AND TELEGRAPH COMPANY V. FRANK
B. CYR ET AL.

Maine Supreme Judicial Court, May 22, 1901.

TELEPHONE APPLIANCES AS PROPERTY.

(Official head-note):

A telephone company which by permission of the municipal officers erects its posts and lines along the highway, under the provisions of chapter 378, Statutes 1885, thereby acquires no interest in the soil except a right to occupy it by the permission of the municipal officers—a mere license revocable at their will, so far as any particular portion of the highway or any particular highway is concerned, and not a permanent, vested interest in the land itself.

As between debtor and creditor, such posts, with the wires and insulators thereon, continue to retain their character as chattels, and may be seized and sold on execution as personal property.

Cases of this series cited in opinion: *Newport Illum. Co. v. Newport Assessors*, vol. 6, p. 659; *Pierce v. Drew*, vol. 1, p. 571.

Appeal by defendant from judgment of Superior Court, Kennebec County, in an action of trespass for tearing down and removing telephone lines.

Argued before WISWELL, C. J., and WHITEHOUSE, STROUT, SAVAGE and POWERS, JJ.

L. C. Cornish and E. O. & F. E. Beane, for plaintiff.

W. C. Eaton, for defendants.

POWERS, J.: On November 4, 1898, the telephone line of the Dirigo Telephone Company, located in the public highway, and running from Mt. Vernon Village, in Mt. Vernon, to Chandler's Mills, in Belgrade, with the poles, wires, and insulators on the same, was sold as personal property on an execution against said company, and afterwards conveyed by the purchaser to the plaintiff corporation, which then strung a second wire upon said poles. The defendants, acting as the agents of the Dirigo Company, in October, 1899, tore down a part of the line, insulators and brackets put up by the plaintiff, and for the injury so done this action of trespass *de bonis* is brought. The only question involved is whether the telephone line of the Dirigo Company, as between debtor and creditor, was personal property at the time of its seizure and sale on execution.

There is no universal test by which it can be determined whether a chattel has become so affixed to the realty as to become accessory to it and form a part and parcel of it. The manner and extent of physical annexation has been declared an uncertain and unsatisfactory criterion, and, while it would be impossible to reconcile all the cases upon this subject, yet the modern and most approved rule appears to be to give special prominence to the intention of the party making the annexation. *Iron Co. v. Black*, 70 Me. 473, 35 Am. Rep. 346; *Parsons v. Copeland*, 38 Me. 537; *Tolles v. Winton*, 63 Conn. 440, 28 Atl. 542; *Field v. Bank*, 148 Ill. 163, 35 N. E. 802; *Pope v. Jackson*, 65 Me. 162; *Hopewell Mills v. Taunton Sav. Bank*, 150 Mass. 519, 23 N. E. 327, 6 L. R. A. 249; *Manufacturing Co. v. Barnard*, 84 Mich. 632, 48 N. W. 280; *Erdman v. Moore*, 58 N. J. Law, 445, 33 Atl. 958; *McRea v. Bank*, 66 N. Y. 489. This rule does not apply to cases in which a party makes improvements and permanent erections without right as between him and the owner of the soil. In such case the intention to preserve the

same as property separate and apart from the freehold cannot avail, no matter how plainly that intention may be manifested. Many other apparent exceptions will be found to involve no real conflict with the rule above stated, when we remember that the intention, which is material, is not the hidden, secret intention of the party making the annexation, but the intention which the law deduces from such external facts as the structure and mode of attachment, the purpose and use for which the annexation has been made, and the relation and situation of the party making it.

In the case before us, the poles were imbedded in the soil, but could be easily removed without any particular injury to the realty or impairment of its value for any of the uses to which it was suited. The whole line was adapted to the use of that part of the realty with which it was connected, but the poles, wires and insulators could be easily removed and used in the same business elsewhere. Under these circumstances, it is especially important to ascertain what right or interest the Digo Company, the owner of these chattels, had in the realty to which it annexed them, in order to determine whether the intention existed thereby to make them permanently a part of the freehold. A different intention may well be inferred from annexations made by a tenant, or mere licensee, than when the same acts are done by the owner of the freehold. Cooley, Torts (2nd Ed.), 501.

The beneficial use of the soil in our highways has been appropriated by the public for public purposes, but the property in the soil still remains in the owner of the adjoining land, who may use it for any purpose, above or below the surface, which does not injuriously interfere with public uses. A telephone is a public use, and the legislature, by virtue of its power of control over the public roads and highways of the State, may grant to a telephone company the authority to erect its lines along or upon such roads and highways, or it may delegate that power to the municipal officers of the several municipalities, as has been

done in this State by St. 1885, c. 378. A telephone company, however, cannot construct its line along the highway at its own pleasure. It is forbidden to do so without first obtaining a written permit from the municipal officers, "specifying where the posts may be located, the kind of posts, and the height at which and the places where the lines may be run." St. 1885, c. 378, sec. 2. Nor is this permission, when once obtained, final and irrevocable, and the use so granted subject to be determined only by the will of the company or the discontinuance of the highway. The same section further provides that "after the erection of the lines, having first given such company, persons, associations, or their agents, opportunity to be heard, the municipal officers may direct any alteration in the location or erection of said posts." These are comprehensive terms. Telephone lines, though affected with a public use, are operated for private gain. Nothing is paid for the valuable privilege of occupying and using the soil of the public roads and highways. The authority to fix the location of the posts, in the first instance, has been wisely given to the municipal officers, and if wisely exercised, the location will be made with a view to existing and probable future conditions. Yet conditions are constantly changing, and, in the growth and improvement of our municipalities, the time may come when it may be desirable to alter the location of one or all of the posts of the line from one side of the street to the other, or from one street to another. What at one time was a suitable location may become unsightly, inconvenient, out of harmony with the surroundings, and the public interest be best served by a change of location. We believe that the legislative intention was to confer upon the municipal officers full authority to meet such requirements by directing "any alteration in the location or erection of such posts" to the extent above indicated. The telephone company then has no interest in the soil which supports its posts and lines, except a right to occupy it by the permission of the municipal officers—a mere license, revocable at their will.

This conclusion is strengthened by the provisions of section 7 of the act of 1885, above cited, that "no enjoyment by any company, persons, or association for any length of time, of the privilege of having or maintaining posts, wires or apparatus in, upon, over or attached to any building or land of other persons shall give a legal right to the continued use of such enjoyment, or raise any presumption of a grant thereof." No legal right to the continued use of the enjoyment of the privilege can be acquired by prescription in the face of this statute. No right to such continued use is granted, for the only privilege granted in any particular spot, parcel, or portion of land is temporary and not permanent—a mere license revocable at the will of the municipal officers, so far as any particular portion of the highway or any particular highway is concerned, and not a permanent, vested interest in the land itself. The provisions of section 2 of the act of 1885 are taken from Pub. St. Mass. c. 109, secs. 2, 3; and section 7 of the same act is an exact copy of chapter 109, sec. 15. In reference to the right in the highway acquired under that chapter, Mr. Justice DEVENS, in *Pierce v. Drew*, 1 Am. Electl. Cas. 571, 136 Mass. 75, 49 Am. Rep. 7, says: "No right is given these companies to use the highways at their own pleasure, or to compel in all cases, as the plaintiff suggests, a location therein to be given them by the municipal authorities. The second section of the statute is to be construed with the third section, and shows an intention that a legally constituted board shall determine not only where, but whether there can be a location which shall not incommode the ordinary public ways, with full power to revise its own doings and correct any errors which the practical workings of the arrangement may reveal. . . . No right to take the private property of the owner of the fee in the highway is conferred by this act. All that is given is the right to use land by permission of the municipal authorities, the whole beneficial use of which had been previously taken from the owner and appropriated to the public. It is a temporary privilege only which is conferred. No right is acquired as against

the owner of the fee by its enjoyment; nor is any legal right acquired to the continued enjoyment of the privilege, or any presumption of a grant raised thereby."

In determining the intention, a most important consideration is the relation of the party making the annexation to the property in question. 1 Washb. Real Prop. (5th Ed.) p. 22.

Tried by this test, no intention can be inferred to make the posts, wires and insulators in this case a permanent accession to the freehold. The owner of the chattels was not the owner of the soil. It had no right to the continued enjoyment of its use—simply a revocable license, a temporary privilege which might be determined at any time by the municipal officers. There is nothing from which it can be inferred that it intended to deprive itself of its property. It is the temporary character of the privilege obtained under the act of 1885 which distinguishes it from the rights and interests of railroad and other quasi-public corporations in lands taken under the right of eminent domain, or in public roads and highways, the use of which has been directly granted to them by the legislature without any such limitations as are imposed by that act. Under such circumstances, the rights and interests acquired are not subject to be determined at the will of third parties, and are permanent and vested.

Cases involving the construction in other States of statutes widely different from our own afford little analogy to the case at bar, and throw little light upon the question here involved. Whether the posts and wires of a telegraph or telephone line are fixtures under the mechanics' lien law, or real estate under the tax law of a particular State, must necessarily be determined by other considerations than those which apply as between debtor and creditor. Under Rev. St. c. 6, sec. 9, which authorizes real estate to be taxed to the owner or person in possession thereof, this court held in *Paris v. Water Co.*, 85 Me. 330, 27 Atl. 143, 21 L. R. A. 525, 35 Am. St. Rep. 371, that water pipes, hydrants, and conduits of a water company, laid through the streets

of a city or town, were real estate for the purpose of taxation; but the charter of the defendant company—Private and Special Laws of 1885 (chapter 369, sec. 6)—authorized it to lay down and maintain them in the streets, and they were not removable at the order of the municipal officers. HASKELL, J., in delivering the opinion of the court, says: "In using the street or road they place their pipes or rails in or upon the ground, there permanently to remain. They occupy land with appliances which become valuable for the revenue they yield. These appliances are fixed, permanent, used in connection with the soil that supports and sustains them. When considered as the property of their respective companies, they are not land, within the common-law rule. But when considered as if owned by the same person, who has title to the soil, they may properly enough be so considered." So a marine railway, built by the owners of the soil upon which it rested, was held to pass by a levy upon the real estate upon which it was built (*Strickland v. Parker*, 54 Me. 263), while side tracks used by the contractors for building a railroad, and laid upon land in which they had no interest, were held to be personal property (*Fifield v. Railroad Co.*, 62 Me. 77). In *Hall v. Inhabitants of Benton*, 69 Me. 346, a boom over land taken by a boom company under its charter and for its chartered purposes, was real estate for purposes of taxation. The right to maintain the boom was without limitation. In *Telegraph Co. v. Middleton*, 80 N. Y. 408, cited by defendant's counsel, it is stated in the opinion that the telegraph poles, with the wires and attachments thereto, which it was alleged were cut down by the defendant, were affixed to the soil of a highway, and constituted a part of the freehold. The report of that case does not show the nature and extent of the plaintiff's right to locate and maintain its poles in the highway. *Electric Tel. Co. v. Overseers of Poor of Salford*, 24 Law J. M. Cas. 146, 11 Exch. 181—the only case cited to support the statement that they form part of the freehold—held that under the English statute, for purposes of taxation, there was a ratable occupation

by the appellants of the soil supporting their posts, and is not in conflict with the decision we have reached. On the other hand, in *Newport Illuminating Co. v. Assessors of Taxes of Newport*, 6 Am. Electl. Cas. 659, 19 R. I. 632, 36 Atl. 426, where the poles were located in the streets by permission of the city council, and the city reserved the right to remove them at any time, it was held that the corporation had acquired no vested right in the streets, and that the poles and wires were simply articles of personal property, although in all probability perhaps they would be permitted to remain substantially as they were for an indefinite period.

Our conclusion is that from the facts of this case no legal inference can be deduced of an intention on the part of the Dirigo Company to annex permanently its posts and the insulators which they supported to the freehold, and make them a part and parcel thereof; that they continued, as between debtor and creditor, to retain their original character as chattels; and, according to the agreement of the parties, the entry must be: Judgment for the plaintiff. Damages assessed at fifty dollars.

NOTE.—In *Dreisbach v. Ross*, 195 Pa. St. 278, March 26, 1900, *held*, that a mortgage upon an electric light plant in one borough covered a pole line in another borough, the line being an essential part of the plant, without which it would be useless.

In *State, Newark & H. Trac. Co. Pros. v. Borough of North Arlington*, New Jersey Supreme Court, June 11, 1900 (46 Atl. Rep. 568), *held*, that an electric street railway is real estate within the tax laws.

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In the Matter of the Application of GEORGE G. RENVILLE, Appellant, for a Peremptory Writ of Mandamus, Addressed to the GOLD AND STOCK TELEGRAPH COMPANY, its Officers and Servants, and to the WESTERN UNION TELEGRAPH COMPANY, its Officers and Servants, Respondents.

New York Supreme Court, Appellate Division, First Department, December, 1899.

(46 App. Div. 37.)

CONTRACT OF TELEGRAPH COMPANY WITH STOCK EXCHANGE—DISCRIMINATION—MANDAMUS.

A telegraph company, receiving information from a stock exchange, a voluntary association endowed by the State with no special privileges or powers, under a contract forbidding the telegraph company to impart such information to persons not approved by the stock exchange, cannot be compelled by mandamus to impart such information to a person whose application therefor has been submitted to the stock exchange and rejected by it.

Had the telegraph company collected the information itself and furnished it to the public, perhaps it would have been bound to furnish the information to all persons willing to comply with the terms imposed by the company as a condition for rendering the services.

Appeal from order of Supreme Court, New York Special Term, denying application for peremptory writ of mandamus.

Henry B. Johnson, for the petitioner, appellant.

Rush Taggart, for the respondents.

INGRAHAM, J.: In this proceeding the appellant seeks to compel the Gold and Stock Telegraph Company to connect a ticker in the petitioner's office with its telegraph wires and to furnish him with quotations of transactions upon the New York Stock Exchange from time to time, as they are made, in the

same manner and for the same price as they are furnished to others. The petition upon which the appellant makes this application alleges that the Gold and Stock Telegraph Company is a domestic corporation organized and existing under the laws of the State of New York; that it was organized under chapter 265 of the Laws of 1848 and acts amendatory thereto; that the said Gold and Stock Telegraph Company availed itself of its franchise granted under such statute, laid its telegraph wires through, in or under the public streets of New York from said New York Stock Exchange, in several directions, and has been for upwards of fifteen years engaged in the business of collecting reports of the purchases and sales of stocks upon the said New York Stock Exchange from time to time as they occur, and of transmitting the information so obtained through its instruments, called "stock tickers," to persons and corporations who are not members of the exchange at their offices and places of business for pay, and that it is now engaged in such business; that the charge required from each subscriber for such service, or for each ticker in the district near the said stock exchange is twenty dollars per month; that on April 18, 1899, the petitioner applied to the said Gold and Stock Telegraph Company for such information or quotations to be furnished him; that such application was accepted; that said ticker and wire were duly installed; that such information or quotations were furnished for about eight days in May, 1899, at the agreed price of twenty dollars per month, which sum was paid in advance for the month of May; that thereafter and during the month of May, 1899, for which said service and quotations were fully paid, the said Gold and Stock Telegraph Company discontinued said service and cut its wire connected with said ticker, and has ever since refused and neglected further to furnish quotations; that in June, 1899, the petitioner tendered twenty dollars to the said telegraph company, to pay in advance for such service or quotations for the month of June, 1899, and that said company refused his money and also refused to restore or continue such

service and the furnishing of such quotations; that the dealings in said stocks upon the New York Stock Exchange aggregate many thousands of shares upon each business day, and that information as to the transactions made upon such exchange is convenient and necessary for the appellant for the proper transaction of his business; that such information and quotations are furnished to a very large number of his fellow brokers and members upon the Consolidated Stock and Petroleum Exchange, doing business in the city of New York, and to many other persons and corporations doing business in stocks as brokers and otherwise, and that by the refusal of the said Gold and Stock Telegraph Company to serve the appellant with such information, he has been and will be irretrievably damaged. Subsequently, by a stipulation, the Western Union Telegraph Company was joined as a party to the proceeding, and the petition and the proceedings were amended accordingly, and it was stipulated that the Western Union Telegraph Company was a corporation duly organized under the act for the incorporation of telegraph companies (Act of 1848, above specified).

The telegraph company served its answer to said petition, alleging that the property of the Gold and Stock Telegraph Company had been leased to the Western Union Telegraph Company, and that the business of transmitting quotations from the New York Stock Exchange and other exchanges had been and was managed and conducted entirely by the Western Union Telegraph Company; that prior to November 19, 1892, the respondents had been in the habit of collecting information as to prices at which stocks, bonds and other securities dealt in on such exchange had been sold, and transmitting such information to its subscribers by means of these instruments, but that subsequent to November 19, 1892, the said New York Stock Exchange, availing itself of a right belonging to it, excluded the employes of the said respondent from access to the exchange, itself collected the information and sold or transferred the same to the Western Union Telegraph Company, which thereupon

and thereafter transmitted such information furnished by the New York Stock Exchange or its employes to persons employing it to furnish them with quotations of stocks dealt in upon the New York Stock Exchange; that the said exchange thereafter, for its own protection and to prevent the improper and illicit use of quotations of stocks dealt in upon the said New York Stock Exchange by bucket shops and persons disposed to use the same for the purpose of defrauding the public, insisted upon its right to dictate the persons who should be entitled to receive the said quotations, and determined to give out the same only to such persons as the said stock exchange was satisfied would use the same properly and not to the disadvantage or defrauding of the public, and it thenceforth refused longer to sell to or give the said Western Union Telegraph Company the said quotations of stocks, bonds and other securities dealt in on the New York Stock Exchange, save and subject to the obligation on its part only to transmit the same to such persons as were approved by said New York Stock Exchange; that on the said 19th day of November, 1892, the New York Stock Exchange, acting through its duly appointed officers with the duly appointed officers of the Western Union Telegraph Company, entered into a contract for the purpose of carrying out the above-mentioned policy of the New York Stock Exchange, a copy of which contract is annexed to the answer. The said contract expired on June 30, 1897, due notice of its expiration having been given by the stock exchange to the respondents. Subsequent to June 30, 1897, pending the making by the New York Stock Exchange of further or other arrangements with respect to its quotations, it continued said contract in force from day to day after June 30, 1897, in consideration of receiving from the Western Union Telegraph Company, for each day during which said contract shall be so continued in force, the sum of ninety dollars, payable at the close of business on each day, it being distinctly understood that all the provisions of said contract, other than those relating to its duration, are to be and remain in force dur-

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ing such temporary continuation of the contract, but that the New York Stock Exchange, or its committee of arrangements, could at any time, without notice, wholly discontinue and terminate said contract, and that upon such discontinuance or termination, all rights of the Western Union Telegraph Company thereunder shall forthwith cease and determine.

By the agreement between the Western Union Telegraph Company and the New York Stock Exchange, in force prior to June 30, 1897, and which, by the arrangements between them, was continued from day to day, it was provided that the stock exchange "agrees at its own cost and expense to collect, furnish and transmit to the telegraph company in the manner hereinafter provided, for distribution by the telegraph company, as hereinafter provided, full and continuous reports of the current transactions, news, quotations and statistics made or originating in the stock exchange, of such things as are or may be dealt in by the members thereof during the hours for trading prescribed by its rules, and also the changes which may occur in the same from time to time;" the stock exchange to transmit by its own telegraph operators over the wires of the telegraph company such information; the telegraph company to receive the same over said wires by its own operators at its main office in the city of New York, and transmit the same over its wires to their customers; the telegraph company to protect its wires so as to render the same, so far as possible, incapable of being tapped, and to use its utmost endeavors to prevent the said reports or any part thereof being taken off said wires or in any way diverted or distributed prior to their being taken off at said main office; the telegraph company to have the right to serve said reports to the members of the New York Stock Exchange at their offices north of Chambers street, and also the right to serve said reports to all persons, firms, corporations and organizations in New York City and elsewhere, wherever the telegraph company might desire to serve them, except to organizations or exchanges in the city of New York competing with the New York

Stock Exchange, and except to members of the stock exchange south of Chambers street, New York City, and except to persons who may be directly or indirectly engaged in the promotion or maintenance of "bucket shops;" the telegraph company not to contract to furnish tickers, and not to furnish tickers to any person, firm, corporation or organization in New York City not already having its instruments, until the application of such firm, corporation or organization should have been submitted to and approved by at least three members of the committee of arrangements of the stock exchange; and as its existing contracts expire from time to time, not to make renewals thereof or continue to furnish services to such parties in New York City until their respective applications for renewals shall have been in like manner submitted and approved.

The purpose of this agreement is obvious. By it the New York Stock Exchange retains control of information as to the transactions made between its members upon its premises, and furnishes such information to the respondents for a specific purpose, the respondents undertaking not to furnish such information to others, except in accordance with the provisions of this agreement. As this agreement continues from day to day, the stock exchange has the privilege of terminating it at any time, and refusing to supply information to the respondents for transmission to others.

The answer also alleges that the appellant applied to the Western Union Telegraph Company to be furnished with quotations; that said application was duly transmitted in good faith by the respondents to the officers of the stock exchange; that the said exchange, for reasons not stated to the respondents, denied such application and refused to permit such quotations to be furnished by means of a ticker, and for that reason the respondents refused to place a ticker in the office of the appellant.

The statute under which the respondents are incorporated (chap. 265, Laws of 1848, as amd. by chap. 559, Laws of 1855) provides in section 11 that "It shall be the duty of the owner

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or the association owning any telegraph line doing business within this State to receive despatches from and for other telegraph lines and associations, and from and for any individual, and on payment of their usual charges for individuals for transmitting despatches, as established by the rules and regulations of such telegraph line, to transmit the same with impartiality and good faith;" that "It shall likewise be the duty of every such owner or association to transmit all despatches in the order in which they are received." (Laws of 1848, chap. 265, sec. 12.) Such provision is continued in the Transportation Corporations Law (chap. 566, Laws of 1890, sec. 103); and by chapter 340 of the Laws of 1850, amending the act of 1848, it is made a misdemeanor for any person connected with a telegraph company to divulge the contents of any message delivered for transmission, which provision has been continued in the revision of the General Laws.

The New York Stock Exchange is a voluntary association. "It has the right to admit to its floor whom it pleases; it obtained nothing from the State except that protection which the law affords to every citizen; it has sought no special privilege and obtained no special powers. It is, therefore, just as much the master of its own business and of the method of conducting the same as any private individual within the State. It may make public the transactions which occur within its walls, or it may refuse all information in respect thereto. No matter which course is pursued, so long as it violates no law, it has a right to conduct its business as it pleases." *Commercial Telegram Co. v. Smith*, 47 Hun, 505; *Wilson v. Telegram Co.*, 18 N. Y. St. Rep. 78.

This private voluntary association, being thus in control of its own property, and having the absolute right to give information as to the dealings of its members with each other to whom it pleases, and upon such conditions as it pleases to impose, gives certain information to the defendants to be delivered to certain specified persons, and upon condition that the defendants give

such information to such specified individuals and none other. The appellant, being one of those to whom the stock exchange refused to allow the information furnished by it to the telegraph company to be transmitted, asked the court, by mandamus, to compel the telegraph company to violate the conditions upon which such information had been received by it, and to furnish such information to him.

We fail to see any principle upon which this application could be granted. It may be conceded that the respondents are corporations charged with the performance of public duties, are under the control of the legislature, and may be compelled by mandamus to perform their obligations to the public. The obligation that they assume is to receive and transmit communications. No statute requires a telegraph company to communicate to the public despatches which it has received from certain individuals to be transmitted to specified persons; on the contrary, such a communication is prohibited. I cannot see that it makes any difference whether a despatch is given to a telegraph company to be communicated to a single individual, or to be communicated to ten, a hundred or a thousand individuals. Under this agreement between the stock exchange and the respondents, certain information is given to the telegraph company to be communicated to individuals or corporations designated by the stock exchange. Whether we call this information a special despatch or general information which the stock exchange desires to communicate, seems to me to be entirely immaterial. The fact that the telegraph company pays to the stock exchange a certain sum of money for the information which it receives to transmit, is also immaterial. The substance is that those to whom this information is directed to be given by the stock exchange are willing to pay the stock exchange for such information, and are also willing to pay the telegraph company the expense of transmitting the information. The information delivered to the respondents for transmission is a communication which the stock exchange wishes to transmit

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to the persons it designates and to no one else. I can see no reason why the stock exchange should be required to furnish the appellant with this information, which relates solely to its own business upon its own property, or why the respondents should be required to violate their agreement with the stock exchange and the law of this State, and furnish to the appellant information which had been communicated to the respondents by the stock exchange for a specific purpose and none other.

An entirely different question was presented when the respondents procured the information themselves, and furnished such information to the public. It may be that, under such circumstances, the respondents were bound to furnish the information thus collected to all persons who were willing to comply with the conditions imposed by the respondents as a condition for rendering the services. There can be no doubt of the fact that the appellant could require the respondents to transmit any communication sent to him from others, or that he wished to send to others; and if the stock exchange desired to communicate to him information as to the dealings between its members, there could be no doubt of the duty of the respondents to comply with such request. But until the stock exchange consents to the appellant receiving such information as it supplies to the telegraph company for transmission, I cannot see that the court has the right to compel the stock exchange to furnish such information to the appellant.

We are referred to several cases from other States, notably to the case of *New York & Chicago G. & S. Exch. v. Board of Trade of the City of Chicago*, 127 Ill. 153. The Chicago Board of Trade was a corporation, and the powers of a court of equity over a corporation are much more extensive than over private individuals, but we cannot agree with that decision so far as it appears to justify an interference by the public or the courts with a voluntary association in the transaction of its business because the public desire information as to its transactions. There is no doubt much information as to the method by which

large corporations, associations or firms transact their business which would be quite valuable to their competitors and interesting to the public, but this would hardly be considered as justifying an interference by the courts. The basis of that decision is that as the board had so conducted its affairs for a long term of years as to create a standard market in agricultural products, and, acting in concert or combination with the telegraph companies, had built up a great system for the instantaneous communication of intelligence concerning the market and its fluctuations, until the public and all persons dealing in such products conform their business to this system, that it could not be allowed to create a monopoly in the matter of the market quotations by furnishing them to some and refusing them to others. It is difficult to see why a voluntary association, because of the importance and character of its business and members and of their transactions, could be compelled to transmit to a particular individual information of its transactions. It was said in the case last cited: "We do not wish to be understood as holding that the Board of Trade is bound by law to continue the business of collecting and furnishing to the public, market quotations, or that it may not voluntarily abandon such business; but we hold, that so long as it continues to carry it on, either directly or indirectly, it must do so without unjust discrimination as to persons." (P. 166.) Or, in other words, that because it gives information to one person it must give the same information to all, and the court will compel it to give such information to any one asking therefor. But the question may well be asked, where does the court get this power? No statute gives it. Nothing that these individuals have done, no obligations that they have assumed to the public, no privileges which they have received from the public, gives to the public the right to interfere with their private business or requires them to give information about it to those who desire such information. No franchise has been conferred upon this voluntary association by the public which justifies an interference by the public with its method of

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conducting its business, and to grant such an application would, it seems to me, be an interference with the liberty of the individual which is protected by the constitution and the law.

The doctrine established in *Munn v. Illinois*, 94 U. S. 113, and kindred cases, does not apply. No property of the stock exchange has been devoted to public use. The stock exchange excludes the public from its property; restricts the transactions therein to its own members; sends information of such transactions to those whom it designates as the persons that are to receive it. Information as to transactions upon the stock exchange is not such property as could be "clothed with a public interest," so that a "grant to the public of an interest in that use" is to be implied. Such information is not property in any sense, and the public or a particular individual has no right to go to this voluntary association and insist that information of its transactions should be furnished.

I cannot think, therefore, that the court had power to grant the relief asked for, and the order appealed from should be affirmed, with ten dollars costs and disbursements.

VAN BRUNT, P. J., PATTERSON and McLAUGHLIN, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements.

STATE EX REL. J. B. GWYNNE V. CITIZENS' TELEPHONE
COMPANY.

South Carolina Supreme Court, July 12, 1901.

TELEPHONE COMPANY—DISCRIMINATION.

A telephone company is a "corporation engaged in the business of transmitting intelligence for hire," and therefore a common carrier of news, as defined by the State constitution, and subject to liability as a common carrier.

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It is therefore bound to supply, to all alike who are in like circumstances, similar facilities, under reasonable limitations, for the transmission of news, without discrimination.

It cannot impose the condition that the patron agree to use its telephone system exclusively, particularly when such stipulation is not required of others in the same business and neighborhood.

Nor can it be excused by the fact that a previous telephone contract with the same patron had been broken by the latter. The remedy for such breach is an action for damages.

Mandamus is the proper remedy.

Cases of this series cited in opinion: *Aiken v. W. U. Tel. Co.*, vol. 1, p. 121; *Pinckney v. W. U. Tel. Co.*, vol. 1, p. 516; *State v. Nebraska Teleph. Co.*, vol. 1, p. 700; *Ches. & Pot. Teleph. Co. v. B. & O. Tel. Co.*, vol. 3, p. 196; *State of Missouri v. Bell Teleph. Co.*, vol. 2, p. 404; *State of Ohio v. Bell Teleph. Co.*, vol. 1, p. 299.

Appeal by petitioner from order of Circuit Court of Common Pleas, Spartanburg County, refusing a writ of mandamus.

H. E. De Pass, for appellant.

Simpson & Bomar, for respondent.

McIVER, C. J.: This was an application addressed to the Circuit Court, for a writ of mandamus, requiring the respondent to place a telephone in the relator's grocery store and one in his residence, in the city of Spartanburg, and to connect them properly with its exchange and its subscribers, and to do all acts necessary to afford the relator the like service and telephonic communication afforded to its other subscribers. The application was refused by the circuit judge, and the relator appealed to this court on the several grounds set out in the record, which it is not necessary to state here, as it will be sufficient to consider the several questions as stated by counsel for respondent in his argument here, which are presented by this appeal.

As is said by the circuit judge in his decree, "there is practically no dispute as to the facts," which may be stated, substantially, as follows: The relator is now, and has been since the

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28th of June, 1898, engaged in the mercantile business, carrying on a retail grocery store in the city of Spartanburg, and occupies a residence in said city; that the respondent, on the 16th day of August, 1898, became a corporation under the laws of this State, for the purpose of owning, constructing, using and maintaining electric telephone lines and exchange within the city of Spartanburg, and as such is now, and was at the time of the commencement of this proceeding, engaged in the said business, having established an exchange in said city, from which connections were made to telephone instruments in offices, places of business and residences of its subscribers; that the city council of Spartanburg has authorized the respondent to erect poles in the streets of the city for the purpose of transporting news over its wires to its subscribers, having a system of wires throughout the city, connected with telephone instruments furnished by it to its subscribers; that whenever a person desires a telephone it is placed in the office, residence, or place of business of the applicant, at the expense of the respondent, with authority to the subscriber to use the same, upon certain rates and terms, for the purpose of telephonic communication with others; that some time in the year 1899 the respondent placed telephones in relator's residence and grocery store, giving proper connections with respondent's exchange and its subscribers or customers throughout the city of Spartanburg and elsewhere; that this was done under an agreement with the relator that he would use respondent's telephones exclusively, and not the telephone of the Bell Telephone Company, and that certain of respondent's subscribers in the said city of Spartanburg, including most of the grocerymen, were furnished with telephones by the respondent under a similar agreement, but some of respondent's subscribers, including some merchants, physicians and others, and one groceryman, whose place of business was on the same street of said city as the grocery store of relator, were supplied with telephones by respondent under agreements which contained no such stipulation as to the exclus-

ive use of respondent's telephones, and they were using both telephones; that on or about the 6th of February, 1900, the respondent learning that the relator had purchased Holland's market, in which there was a telephone placed there by the Southern Bell Telephone Company, a corporation duly chartered under the laws of this State, and that said market immediately adjoined relator's grocery store, and that relator had cut a door through the wall separating his grocery store from said market, thus opening a means of communication between the two structures, immediately removed, against the protest of the relator, the telephones which the respondent had previously placed in relator's grocery store and residence, for the avowed purpose of preventing the relator from using respondent's telephones while he was using the Bell telephone, respondent claiming that under its agreement with relator he was bound to confine himself to the use of respondent's telephones; that on or about the 8th of February, 1900, the relator tendered to respondent the amount due for the past use of respondent's telephones, which was accepted, and that relator thereupon demanded that respondent place one of its telephones in his grocery store and one in his residence, with proper connections with respondent's exchange and its subscribers, but the respondent refused to comply with such demand unless the relator would agree to use respondent's telephones exclusively, and not use the telephone which had been placed in said market by the Bell Telephone Company.

The respondent, in its answer, alleges "that its supply of telephone instruments is limited, and that it is with difficulty that this respondent can furnish such instruments to all applicants therefor; that, even if the respondent was legally bound to furnish such instruments now, it would be impossible for it to do so within less than sixty days, for the reason of its inability to enlarge its switchboard." But as this allegation is not responsive to any allegation contained in relator's petition, and was not sustained by any evidence, so far as the "case"

shows, it cannot now be considered. Besides, this court having reached the conclusion, as will presently appear, that the relator is entitled to the mandamus, for which purpose the case will be remanded to the Circuit Court, with instructions to carry out the views herein announced, that court can, in its order directing the writ of mandamus to be issued, make such provision by giving a reasonable time within which the duty sought to be enforced shall be performed, provided the fact be as alleged in the foregoing quotation from respondent's answer.

We will next proceed to consider the several questions of law growing out of the facts above stated, and presented by this appeal. These questions are thus stated in the argument here on the part of the respondent, and we propose to adopt that statement: (1) Is the defendant telephone company in any sense a common carrier? (2) Can the defendant telephone company be required in any case, against its will, to supply one of its instruments to petitioner? (3) Can the defendant telephone company be required by mandamus, under the circumstances of this case, to so furnish its instruments to petitioner?

The first, and as it seems to us the controlling, question in the case, is, we think, conclusively determined by the provisions of section 3 of article 9 of the present constitution, which reads as follows: "All railroad, express, canal and other corporations engaged in the transportation for hire and all telegraph and other corporations engaged in the business of transmitting intelligence for hire, are common carriers in their respective lines of business, and are subject to liability and taxation as such,"—the balance of the section not being pertinent to the present inquiry. Now, if the respondent, Citizens' Telephone Company, is a corporation, and is "engaged in the business of transmitting intelligence for hire," then it is expressly declared by the highest authority to be a common carrier. That it is a corporation is not and cannot be denied, and, as we think, it is equally undeniable that it is "engaged in the business of

transmitting intelligence for hire." Indeed, that, so far as appears in this case, is the only business in which it is engaged. The distinction sought to be drawn by counsel for respondent in his argument here, between the mode of transmitting intelligence or a message, as it is usually called, by telegraph and by telephone, is a distinction without a difference, so far as the question with which we are concerned is involved. While it is true that a person desiring to send a message by telegraph to another usually writes out his message and delivers it to the agent of the telegraph company (though we see no reason why it may not be delivered by word of mouth, or over a telephone, as no doubt is frequently the case), and the agent transmit such message, through the agency of instrumentalities provided by the telegraph company, to another agent of such company at its destination, who writes it out, or delivers it by word of mouth or over a telephone to the person for whom such message is intended, whereas a person desiring to send a message by telephone simply goes to the instrument provided for the purpose by the telephone company, calls up the agent of the company at the central office, and expresses his desire to be connected with the person to whom he wishes to speak, which being done by the agent of the company at the central office, the message is delivered directly to the person for whom it is intended, through the instrument and over the wires provided by the telephone company for the purpose, in both instances the intelligence or message is actually transmitted by the use of agencies and instrumentalities furnished either by the telegraph or the telephone company, for which they are entitled to receive proper compensation, and one is just as much engaged in the business of transmitting intelligence for hire as the other. Both are devices by which one person is enabled to communicate with another beyond the reach of the human voice, unaided by some artificial appliance, and, although there are some differences in the mode of transmitting intelligence, yet the end sought and attained by each is substantially the same. Again,

it is argued that there is another difference between the telegraph and the telephone which differentiates the former from the latter, and prevents legislative or constitutional provisions expressly applying to the former from being applied to the latter, and that is in the one case the purport of the message or intelligence to be transmitted must be known to the agent of the company, while in the other it need not be. In the first place, this difference does not always exist, as a matter of fact; for in many cases the purport of messages sent by telegraph are just as effectually concealed from the agent of the telegraph company as a message sent by telephone,—in fact, more so; for in the case of a telegram in cipher, which is quite common, the purport of the message is entirely concealed, and is intended to be concealed, from the knowledge of the telegraph operator, and from every one else, except a person holding the key to the cipher, while, on the other hand, messages sent by telephone are not, as matter of fact, always concealed from the knowledge of the agent of the telephone company, nor from third persons who may choose to listen. But, even if such differences did exist, it is difficult to conceive how that would affect the substantial identity of the business in which the two companies are engaged.

Again, it is argued that the framers of the constitution, being, as they were, familiar with the use of the telephone, would, if they had intended to include telephone companies within the provisions of the section of the constitution above quoted, have mentioned such companies by name. This argument is based upon a misconception of the fundamental idea of the constitution, which is that such an instrument is the organic law, and deals with general principles, and does not and should not descend into details. But the conclusive answer to such argument is that the framers of the constitution certainly did not intend to limit its operation to telegraph companies, as otherwise the additional words, “and other corporations engaged in the business of transmitting intelligence for hire,” would be

come wholly unmeaning and useless. These additional words were manifestly inserted for some purpose, and it is impossible to conceive of any other purpose except to include every other corporation, by whatever name it may be called, and by whatever means it conducts its business, which may be "engaged in the business of transmitting intelligence for hire," and, as we have shown that a telephone company is engaged in that business, telephone companies must be regarded as included within the terms of the constitutional provision.

The reference to section 3 (manifestly a misprint for section 4) of article 8 of the constitution, and to the act of 1898 (22 St. at Large, p. 779), and also act of 1898 (22 St. at Large, p. 780), to support respondent's contention, will next be considered. This constitutional provision simply forbids the general assembly from passing any law "granting the right to construct and operate a street or other railway, telegraph, telephone or electric plant, or to erect water or gas works for public uses, or to lay mains for any purpose, without first obtaining the consent of the local authorities in control of the streets or public places proposed to be occupied for any such or like purposes." What possible bearing this provision can have upon the question we are considering, to wit, whether a telephone company can be regarded as, in any sense, a common carrier, it is impossible to conceive. Indeed, if it has any bearing at all, it would seem to be adverse to the contention of respondent; for it seems to recognize the idea that, when a telephone company establishes its plant in a town or city, it devotes its property to public uses, and thus brings it under legislative control. Nor do we see the relevancy of the two acts above referred to. The former forbids telephone companies from making unreasonable discrimination in the rates at which they furnish telephonic service to its patrons, and this necessarily implies that its business is subject to legislative control. The other act simply invests the railroad commission with power to regulate the charges of express companies for transportation

and the charges of telegraph companies for the transmission of messages. But until it is shown, as it has not and cannot be shown, that the power to regulate charges by law is a feature essential to the business of a common carrier, the provisions of this act do not even tend to show that a telephone company is not a common carrier. Indeed, as a matter of fact, the rates of charges by all classes of common carriers—for example, steamboat companies—are not regulated by law.

But, even if there were no constitutional provision and no legislation upon the subject, we are of opinion that this question is settled by the principles of the common law, which, being elastic in their nature, may be applied to subjects and conditions which have but recently become known and used in the business of the country. In this State we have no case, so far as we are informed, upon the question whether a telephone company is, in any sense, a common carrier, and we have only two cases relating to the somewhat analogous question as to whether a telegraph company is a common carrier, viz., *Aiken v. Telegraph Co.*, 1 Am. Electl. Cas. 121, 5 S. C. 358, and *Pinckney v. Telegraph Co.*, 1 Am. Electl. Cas. 516, 19 S. C. 71, 45 Am. Rep. 765; but neither of these cases decides that a telegraph company is in no sense a common carrier, though the contrary seems to be supposed (erroneously, as we think) by some. Both of these actions were brought to recover damages for errors in the transmission of messages sent over the lines of the telegraph company occasioned by the alleged negligence of the defendant companies. In neither of these cases was the question made or decided as to whether a telegraph company was a common carrier. On the contrary, in the *Aiken Case*, WILLARD, J., in delivering the opinion of the court, uses language implying that a telegraph company is a common carrier; for on page 370 he says: "It is a contract with one exercising a public employment under express statute powers created for that purpose. The nature of the occupation of that class of persons, and the tender of their services to the community, make them common agents

for the transmission of messages, for all persons who may desire and pay for such services, to any person, either as the final receiver of such message, or as a means or agent for its further transmission. The object of the contract is to modify and limit the contract which, by operation of law, would arise between the common carrier of messages and any person employing such carrier, in the absence of any stipulation of terms between them. The foundation of the contract is the nature of the carrier's occupation and the fact of employment. The legal consequences flowing from such employment are what the special contract seeks to modify or limit." It is true that on the next page the learned justice does say: "The regulation of the defendants in conformity with which the terms of the contract limiting their liability was made was a reasonable regulation, and such as the defendants were authorized to make. In examining the proposition just stated, it must be borne in mind that the analogy between common carriers of goods and common carriers of messages is not perfect. The nature of the services performed differs materially in the two cases, and the real responsibility differs in a corresponding manner." That case, therefore, as we understand it, simply decides that where a telegraph company agrees to send a night message, which it is not bound to send under certain stipulations as to its liability in case of errors in the transmission of such message, such stipulations are reasonable, and may be enforced; but the case throughout recognizes the doctrine that a telegraph company is a common carrier, though the analogy between common carriers of goods and common carriers of messages is not perfect, owing to the fact that the nature of the services rendered differs materially in the two cases, and hence the measure of responsibility for any default in rendering the services must likewise differ. So, in the *Pinckney Case*, *supra*, the court, while not undertaking to decide whether a telegraph company could in any sense be regarded as a common carrier, as no such question was presented in that case, simply decided that a telegraph com-

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pany was not held to the stringent rule of the common law whereby common carriers of goods were held liable for all such losses and damages as they could not show resulted from the act of God or the public enemy, but were only liable for all such losses and damages as they could not show were not due to the fraud or negligence of their agents or servants; and the reason for such a limitation of the rule was found in the peculiar nature of the business in which a telegraph company is engaged, differing in material respects from that of common carriers of goods. While it is true that the late Chief Justice SIMPSON, in delivering the opinion of the court, does use some expressions which may possibly seem to indicate that he thought a telegraph company was not a common carrier, yet that was not a question in the case, and therefore such expressions, even if amounting to what is claimed for them, are not authoritative; for, as the learned chief justice himself says on page 82, there is but a single question in the case, and he thus states that question: "The question to be considered, therefore, is whether telegraph companies are liable for all mistakes made in the transmission of messages except such as occur from any act of God or irresistible force, the onus of showing which is upon them."

In other jurisdictions, however, the question has been made and distinctly decided. Among the various cases which we have consulted we cite, first, the case of *State v. Nebraska Telephone Co.*, 1 Am. Electl. Cas. 700, 17 Neb. 126, 22 N. W. 237, reported also in 52 Am. Rep. 404. In that case the facts were in substance very similar to the facts in the case which we are now called upon to decide, and it was there held that a telephone company cannot arbitrarily or capriciously refuse its facilities to any person desiring them and offering compliance with its reasonable regulations, and that mandamus will issue to compel the company to do its duty. The facts of that case were substantially as follows: The relator made an arrangement with the defendant company to place an instrument in his office, but for some reason failed to furnish the relator with a

directory or list of its subscribers with their numbers, which relator claimed was essential to the profitable use of the telephone, and which it was the custom of the company to furnish to its subscribers. After a time such list was furnished to the relator by the company, but when called upon by the company to pay for the use of the telephone in his office the relator refused to pay for the use of the telephone during the time the company was in default in furnishing the directory or list of subscribers. Thereupon the defendant company removed the telephone from the office of the relator. Subsequently the relator applied to the company to become a subscriber and to have an instrument placed in his office, which the company refused to do, whereupon the relator applied for a writ of mandamus to compel the company to comply with his demand. In that case the court proceeded upon the fundamental doctrine that when a person or company, especially one who is exercising its franchises under its charter, devotes its property to a public use by undertaking to supply a demand which "is affected with a public interest," it must supply all alike, who are alike situated, and cannot discriminate in favor of or against any one. In the course of the opinion the Court uses the following language: "That the telephone, by the necessities of commerce and public use, has become a public servant, a factor in the commerce of the nation, and of a great part of the civilized world, cannot be questioned. It is, to all intents and purposes, a part of the telegraphic system of the country, and in so far as it has been introduced for public use, and has been undertaken by the respondent, so far should the respondent be held to the same obligation as the telegraph and other public servants. It has assumed the responsibilities of a common carrier of news. Its wires and poles line our public streets and thoroughfares. It has, and must be held to have, taken its place by the side of the telegraph as such common carrier."

So, in *Chesapeake & P. Telephone Co. v. Baltimore & O. Telegraph Co.*, 3 Am. Electl. Cas. 196, 66 Md. 399, 7 Atl. 809,

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reported also in 59 Am. Rep. 167, ALVEY, C. J., in delivering the opinion of the court, uses this language: "The appellant [the telephone company] is in the exercise of a public employment, and has assumed the duty of serving the public while in that employment. . . . The telegraph and telephone are important instruments of commerce, and their services as such have become indispensable to the commercial and business public. They are public vehicles of intelligence, and they who own and control them can no more refuse to perform impartially the functions that they have assumed to discharge than a railroad company, as a common carrier, can rightfully refuse to perform its duty to the public. They may make and establish all reasonable and proper rules and regulations for the government of their offices and those who deal with them, but they have no power to discriminate, and, while offering [themselves as] ready to serve some, refuse to serve others. The law requires them to be impartial, and to serve all alike, upon compliance with their reasonable rules and regulations."

Again, in *State v. Telephone Co.* (C. C.), 2 Am. Electr. Cas. 404, 23 Fed. 539 (decided in 1885), Judge BREWER, now one of the associate justices of the Supreme Court of the United States, after laying down the general principle that where a corporation, deriving its franchises from its charter, devotes its property to public uses, its property is put into the channel of commerce, and thereby becomes subject to the control of the law regulating such commerce, uses this language: "A telephonic system is simply a system for the transmission of intelligence and news. It is, perhaps, in a limited sense, and yet in a strict sense, a common carrier. It must be equal in its dealings with all." That case seems to have been carried by writ of error to the Supreme Court of the United States, but was never considered by that court, for in 127 U. S. 780, we find this simple statement: "Dismissed with costs, on the authority of the plaintiff in error. April 18, 1888." In 25 Am. & Eng. Enc. Law, at page 750, we find the following: "Telephone com-

panies, like telegraph companies, are to some extent common carriers, and are bound to afford equal facilities to all. They can be compelled by mandamus to furnish facilities to one offering to comply with their regulations, even though such a party is a rival company." To same effect, see page 775 of same volume, and on page 776 it is said: "In many of the States statutes exist which provide for the enforcement of these obligations, but it seems that the rule would be the same whether the obligation was declared by statute or considered as arising from the common law;" for as was said in *State v. Nebraska Telephone Co.*, *supra*, in commenting on *State v. Bell Telephone Co.*, 1 Am. Electl. Cas. 299, 36 Ohio St. 296, 38 Am. Rep. 583, where there was a statute upon the subject: "So far as the obligations of the telegraph companies are defined by the act (except the payment of the penalty), they are simply declarative of the common law. These obligations are imposed by the demands of commerce and trade, and it would be idle to say they existed only by force of the statute, and the same is true of the clause of the act making its provisions applicable to telephones." Again, it is said in the same case: "Similar questions have arisen in, and have been frequently discussed and decided by, the courts, and no statute has been deemed necessary to aid the courts in holding that, where a person or company undertakes to supply a demand which is 'affected with a public interest,' it must supply all alike who are like situated, and not discriminate in favor or nor against any." It is true that, in the more recent edition of the Encyclopædia above referred to, the rule is stated in a more modified form (see 6 Am. & Eng. Enc. Law [2d. Ed.], at page 261), where the following language is used: "It was at one time attempted to class telegraph companies as common carriers, but the view universally adopted now is that they can in no sense be regarded as common carriers. *They are like common carriers in that they are bound to serve impartially all those applying to them, but they are liable for improper transmission of messages only upon*

proof of negligence." So that it is apparent, from the language which we have italicized in the foregoing quotation, that the rule, even when stated in its modified form, supports the contention of the relator, assuming, as we are authorized to do by the authorities, that the rule applicable to telegraph companies is also applicable to telephone companies, at least so far as the obligation to serve all alike who apply for the use of the facilities which it offers to the public for the transmission of news is concerned.

We are satisfied, therefore, that while a telephone company may not be, in every sense of the term, a common carrier of goods, and as such subject to the same stringent rules which govern in ascertaining the liability of such carriers, yet, in one sense at least, it is a common carrier of news, and as such bound to supply all alike, who are in like circumstances, with similar facilities, under reasonable limitations, for the transmission of news, without any discrimination whatsoever in favor of or against any one; and this is so under the well-settled principles of the common law, without the aid of any constitutional or statutory provision imposing such an obligation. The answer to the second question, under what has already been said, must necessarily be in the affirmative.

To dispose of the third question, it will be necessary to recur somewhat to "the circumstances of this case." The undisputed facts are that the respondent, in the exercise of its franchise conferred by its charter, had established a telephone business in the city of Spartanburg, and had erected its poles and strung its wires in and along the streets of said city, and thus had become at least a *quasi* common carrier of news, and as such was under an obligation to serve all alike who applied to it, within reasonable limitations, without any discrimination whatsoever. When, therefore, the relator applied to the respondent to replace the telephone instruments in his grocery store and in his residence, from whence they had been removed by the defendant company but a few days before, the respondent

was, in our opinion, bound to comply with such demand, under the obligations to the public which it had assumed. The reason given for its refusal—that the relator refused to agree that he would use respondent's telephone system exclusively—was not sufficient to relieve it from its obligation to serve the public, of which the relator was one, without any discrimination whatsoever; and especially is this so when it was admitted that the respondent was, at the time, affording to one person, at least, who was engaged in the same business as that of the relator, whose place of business was on the same street of the same city, the same facilities which the relator demanded, without requiring any such stipulation as that required of the relator, but who was, in fact, using both telephone systems. It seems to us that the respondent, after offering to the public its telephone system for the transmission of news, would have no more right to refuse to furnish the relator its facilities for the transmission of news unless he would agree not to use the Bell telephone system in operation in the same city, but use exclusively respondent's system, than a railway company would have to refuse to transport the goods of a shipper unless such shipper would agree to patronize its line exclusively, and not give any of its business to any competing railway line. Nor does the fact (if fact it be) that the relator had committed a breach of its previous contract with respondent when he purchased Holland's market, in which an instrument of the Bell Telephone Company had been placed, and had thereby acquired the right to use the Bell telephone, afford any reason why the respondent should decline to comply with relator's demand to furnish his grocery store and residence with its telephone instruments. If the relator had committed any breach of its previous contract with the respondent of which the latter had any legal right to complain, its remedy, as was said in one of the cases which we have consulted, was by an action to recover damages for such breach of contract, but not by refusing to perform its obligation to the public, of which the relator was one.

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As to the other reason suggested why the mandamus prayed for should not issue under the circumstances of this case, to wit, that respondent did not have the means to comply with the demand of the relator within less than 60 days, it is only necessary to repeat what we have said above, that there does not appear to be any evidence in the 'case' to sustain the fact upon which this suggestion is based, and therefore it cannot now be considered. Besides, as is said above, that is a matter which may be considered when the case goes back to the Circuit Court, which can, in ordering the mandamus to issue, as herein directed, make suitable provision for allowing respondent reasonable time, if such shall be shown to be necessary, to comply with relator's demand.

As to the position taken in the argument, that mandamus is not the proper remedy, we think it entirely clear, both upon principle and authority, that mandamus is the appropriate remedy in a case of this kind. The judgment of this court is that the judgment of the Circuit Court be reversed, and that the case be remanded to that court, with instructions to carry out the views herein announced.

NOTE.—In *People ex rel. Cairo Teleph. Co. v. W. U. Tel. Co.*, 166 Ill. 15, April 3, 1897, held that a telegraph company which has the right to choose its own agencies for delivery of messages, and to require that messages for transmission be in writing, does not unlawfully discriminate against a telephone company by refusing to deliver or receive telegrams by its telephones, though by contract with another telephone company messages are so delivered and received by its telephones.

In *re Baldwinsville Teleph. Co.*, New York Supreme Court, Onondaga Special Term, July, 1898 (24 Misc. Rep. 221), held that a reasonable construction of the Transportation Corporations Law does not require a telephone company to furnish to another company connection with its system, to be used by the latter as part of its own system, upon paying the ordinary subscriber's tariff.

Query: Whether said statute requires a telephone company to furnish instruments to its patrons at their homes or places of business.

OWENSBORO HARRISON TELEPHONE COMPANY v. J. B. WISDOM.

*Kentucky Court of Appeals, May 1, 1901.*TELEPHONE COMPANY—BREACH OF CONTRACT FOR USE OF INSTRUMENT—
MEASURE OF DAMAGES.

A telephone company, having contracted to furnish the proprietor of a general messenger business, with the use of a telephone for a fixed time at a fixed rate, has no right to refuse connection for the purpose of notifying persons wanted at another telephone exchange, or to remove its instrument because of refusal to pay on account of such refusal to connect, and for such removal is liable in damages.

In such case prospective profits are a proper element in measuring damages; and a verdict based on reasonable increase of business will not be disturbed as excessive.

Appeal from Circuit Court, Daviess County.

Action for damages for breach of contract.

Judgment for plaintiff; defendant appeals. *Affirmed.*

Wilfred Carico, for appellant.

Hayes & Wells, for appellee.

HOBSON, J.: Appellee, J. B. Wisdom, instituted this action in equity against the Owensboro Harrison Telephone Company, a corporation doing a telephone business in the city of Owensboro. He alleged that on June 22, 1896, he was engaged in the business of carrying and delivering parcels and messages and doing a general messenger business in the city of Owensboro and vicinity under the name of the "Messenger Service;" that he entered into a written contract with the appellant, whereby it agreed to rent one of its instruments to him, and place it in his office, and give him connection with its other subscribers, furnishing him a good telephone service for a period of three years, for which he agreed to pay it \$2.50 a month; that on

August 26th it refused to give him the connections as requested, and continued so to do until September 16th, when it took the box out and thereby disabled him from carrying on his business, and damaged him in the sum of \$1,000. He prayed judgment for the damages, and for a mandatory injunction requiring it to replace the instrument. The allegations were denied by answer, and on the plaintiff's motion the case was transferred to the ordinary docket for a trial of the legal issues. The jury to whom the case was submitted found a verdict for the plaintiff, and fixed the damages at \$300. Judgment was entered upon this verdict, and the telephone company appeals.

In overruling the motion for a new trial, the Court below delivered the following opinion, which we adopt:

"This case is under submission on a motion for a new trial, and, as I regard it, the substantial, if not the only, real ground for complaint on the part of the defendant is excessive damages found by the jury; for I am of the opinion that upon the evidence the plaintiff was entitled to recover. The plaintiff had a contract with the defendant for the use of its telephone in his business of messenger for a period of three years at the rate of \$2.50 per month, payable monthly, and without just or reasonable cause defendant took its telephone out of plaintiff's place of business. The plaintiff had paid, and was able and willing to continue to pay, for the unrestricted use of the telephone; but defendant required plaintiff to cease the delivery of messages over its telephone coming to him over the Cumberland Telephone, although such messages were no more than to notify persons wanted at the Cumberland exchange that they were wanted; and when the plaintiff refused to submit to this proposed restriction and pay for the continued use on such condition, the defendant removed the instrument from plaintiff's place of business. The court was of the opinion that the character of message delivered by plaintiff over its telephone for the Cumberland was a legitimate and reasonable use of it. Had plaintiff undertaken to deliver the messages themselves sent

over the Cumberland to the recipient, perhaps it would not have been a reasonable use. But such was not the use made of defendant's 'phone in any instance as shown by the evidence. The nature of plaintiff's business was made known to the defendant at the time of the contract, and the contract was entered into with reference to his business, so that defendant undertook with plaintiff that he should have all the service and use of its telephone that the needs of his business might reasonably require; and, impliedly, that upon a breach of its contract and refusal to allow him the continued use of it defendant would be liable to him for the loss and damage he might sustain thereby. There is nothing in the contract, or its breach, or the state of facts presented in the evidence, tested by any rule of law applicable to the case, which would enable a court or jury to arrive with demonstrable, proximate certainty at the damage sustained by plaintiff by reason of the breach of its contract by defendant. The plaintiff claims a damage of \$1,000. He claims the actual total destruction of his business by the act of the defendant in taking its telephone out of his office. According to his evidence, if I remember correctly, he estimated that four-fifths of the business, which consisted in the transmission of messages, was done over defendant's telephone. His testimony shows that for the several months he had conducted the business the profits had been exceedingly small, but that it was growing, and that he calculated that in the course of time it would get to be worth \$—— per annum. How long a time would be required to build up such a valuable business was not shown by the evidence. And altogether it seemed to me an unusually difficult matter to determine what was the proper criterion of damages. The whole value of the plaintiff's business consisted in its profits, his receipts for messages, etc., delivered, four-fifths of the whole for messages sent over the defendant's telephone, and without the use of defendant's telephone plaintiff testified that his business could not be maintained. In fact, plaintiff's enterprise, present and prospective, was dependent upon the use of

defendant's telephone. But, of course, this fact could not enter into the consideration of the jury, as it does not appear to have been known to the defendant at the making of the contract. The measure of the damage in such a case is compensation. The plaintiff is entitled to recover all loss and damage sustained as the direct or proximate consequence of defendant's breach of its contract susceptible of ascertainment by competent evidence. The plaintiff is entitled to the full value of his contract as far as ascertainable; to such damage as might reasonably be supposed to be contemplated by the parties in making the contract. Such damages are usually easily susceptible of proof. If this were an ordinary contract for a commodity at a fixed price, having a market value, or a personal service, where the damage would be the difference between the contract price and the market price at the time and place fixed for performance, we could find little difficulty in measuring the damage. Here we have a contract continuing for a period of three years. At the expiration of four months it is broken by the defendant's withdrawing from plaintiff the use of its telephone. The damage sustained by plaintiff by reason of this breach is the profit he might have made by its use during the residue of the contract period, thirty-two months. It is readily perceived that this cannot be ascertained with certainty, and the difficulties of its ascertainment are enhanced by the fact that plaintiff abandoned his business shortly after defendant took its telephone out of his place of business, because he says it ceased to be profitable. The contract price to be paid for the use of the telephone furnishes no criterion, and sheds no light on the question of damage. As a matter of law, there is, I think, no doubt that the plaintiff may recover prospective profits for the whole contract period; in other words, he is entitled to the full value of his contract. But the difficulty is, and ever must be, in cases of this kind, to reach this value with reasonably approximate certainty. This damage, in the very nature of the case, must be more or less speculative and uncertain, and this must be known to the parties to such contracts. And, while

such damages are recoverable, any verdict or judgment for such damage must be based upon existing facts. In this case the testimony shows growing business as evidenced by actual receipts, and I think the jury might reasonably have found that the rate of reasonable increase shown would warrant the conclusion that four-fifths of the profits plaintiff might make in the thirty-two remaining months covered by the contract would be \$300 (above the cost of the telephone), which is the verdict in this case. I think the court's instructions are about right, and the verdict likewise; so I overrule defendant's motion to set aside the verdict. As to the contention of the defendant that the verdict of the jury in the case is merely advisory, the court is of the opinion that it is not tenable. In so far as the plaintiff seeks to compel a restoration of the defendant's telephone by mandatory injunction, this action is equitable, but, in so far as it seeks to recover damages for breach of contract, it is purely a law action; and on the issue for damages either party had the right to demand a jury trial, and where that is the case the jury's verdict is binding on the court, and has the effect, and is subject to the same rules, as in all common-law actions. Motion overruled.

NOTE.—In *United Elec. Lt. & P. Co. v. Brenneman*, New York Supreme Court, Appellate Term, First Department, July, 1897 (21 Misc. Rep. 41), a contract between an electric company and a consumer provided for stipulated damages to the company in case, through the fault of the consumer, it should be prevented from supplying current pursuant to the contract. *Held*, that by discontinuing the use of the current temporarily, while awaiting a tenant for his store, the consumer did not become liable for the liquidated damages, but that on the contrary, the company broke the contract by cutting out the connection.

In *Malochee v. Great Southern Teleph. & Tel. Co.*, 49 La. Ann. 1690, December 28, 1897, the following is the head-note by the court:

"The subscriber for telephone service, who, in default of payment stipulated for the service, is notified by the telephone company that the telephonic instruments will be removed from his premises unless he pays the amount due, and replies that the company can do as it pleases, has no claim for damages because the instruments are thereafter removed by the company, the written notice of the removal, specified in the contract, being wholly unnecessary, and is to be deemed waived."

NEBRASKA TELEPHONE COMPANY V. STATE, EX REL. YEISER.

Nebraska Supreme Court, June 23, 1898.

(55 Neb. 627.)

TELEPHONE RATES—JUDICIAL CONTROL.

(Head-note by the Court):

A litigant will not be permitted to invoke the extraordinary remedy of mandamus when an express statute affords him an adequate remedy for the redress of the grievance of which he complains.

A private corporation, engaged in the business of operating a telephone plant, is a common carrier of news and intelligence.

Such a public service corporation is charged with certain public duties, among which are to furnish for a reasonable compensation to any citizen a telephone and telephonic service, and to charge each patron for the service rendered the same price it charges every other patron for the same service under substantially the same or similar conditions.

The power—the jurisdiction—to determine what compensation a public service corporation may exact for services to be rendered by it is a legislative, and not a judicial, function.

The jurisdiction of the courts is limited to declaring what the law is, and they are forbidden by the constitution to perform legislative functions.

Cases of this series cited in opinion: *State v. Nebraska Teleph. Co.*, vol. 1, p. 700; *W. U. Tel. Co. v. Call Pub. Co.*, vol. 5, p. 673.

Appeal by defendant below from judgment of District Court, Douglas county, granting a writ of mandamus.

W. W. Morsman and Chas. Offutt, for plaintiff in error.

John O. Yeiser, contra.

RAGAN, C.: The Nebraska Telephone Company is a corporation organized and existing under the laws of the State, having its principal office and place of business in the city of Omaha, and owns and operates a telephone plant in that city. John O. Yeiser is by profession a lawyer, and a citizen of said city of Omaha. Yeiser desired a telephone placed in his law office

for his own use, and requested the telephone company to furnish him an instrument properly connected, and afford him telephonic service. The telephone company refused to comply with this request unless Yeiser would pay it for such instrument and service the sum of five dollars per month in advance. Yeiser claimed that this sum was an unreasonable and exorbitant charge, refused to pay the same, but tendered the telephone company nine dollars as compensation for the service required of it for three months, and demanded that it supply him with the telephone and telephonic service for that length of time. This demand was refused, and Yeiser thereupon applied to the District Court for, and obtained, a peremptory writ of mandamus directed to the telephone company, commanding it to furnish Yeiser the telephone and telephonic service required by him for three months for the sum of nine dollars. The telephone company has brought this judgment here for review.

1. Section 1, art. 8, c. 72, Comp. St. 1897, provides that all charges made for any service rendered or to be rendered by the common carriers of the State shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful. By section 11 of said article and chapter certain State officers are constituted a board of transportation, and section 12 of said article and chapter defines the powers and duties of said board of transportation with reference to the common carriers of the State. Construing this statute, this court held, in *State v. Fremont, E. & M. V. R. Co.*, 22 Neb. 313, that the board of transportation had authority to determine what were just and reasonable charges for a service rendered or to be rendered by common carriers, and that said board of transportation was invested with jurisdiction to fix, prescribe and determine the charges which a common carrier might demand and receive for a service rendered or to be rendered by it, subject only to the limitation that the rate or charge fixed by the board should be just and reasonable. The legislature of 1897 (see Sess. Laws 1897, c. 56, sec. 24; Comp.

St. 1897, c. 72) conferred upon this board of transportation the same and all powers over the telephone, telegraph and express companies of the State that it had over common carriers or railroad corporations of the State. In other words, if the statutes just referred to are valid, and we have placed a correct construction upon them, the legislature has conferred upon this board of transportation not only jurisdiction to inquire into charges of extortion and unjust discrimination on the part of the telephone companies, and to make suitable orders for the redress of such grievances upon the complaint of the person aggrieved, but has also invested the board of transportation with authority to fix and determine to what compensation a telephone company shall be entitled for any service rendered or to be rendered by it, subject to the limitation that the scale of prices fixed which the telephone company may charge for services to be rendered by it shall not be unreasonable or unjust either to the telephone company or its patrons. *State v. Chicago, St. P., M. & O. R. Co.*, 19 Neb. 476, was a mandamus proceeding instituted in this court to compel the respondent to build a depot, side tracks, switches, and cattle yards at a certain point on its road. But this court held that whether the railway company should be compelled to build a depot at the place requested was a question—in the first instance, at least—for determination by the board of transportation; that the legislature, by the statute just quoted, had committed the determination of that question to that board; that because the board was a special tribunal, created for the purpose of determining the question, its powers in that respect must be exhausted before the court would interfere by mandamus to compel the railroad company to build the depot. We think this case controls the one at bar. So far as the record before us discloses, no application has ever been made by the relator to the board of transportation to have it determine whether the charge of five dollars per month demanded by the telephone company for the use of a telephone and telephonic

service, is unreasonable and exorbitant; whether three dollars per month for the use of a telephone and telephonic service is a reasonable charge; nor that the board has fixed a scale of reasonable charges which the telephone company may exact for a service performed or to be performed by it. It is a familiar principle that the litigant will not be permitted to invoke the extraordinary remedy of mandamus where an express statute affords him an adequate remedy for the redress of the grievance of which he complains, and this is the principle upon which the case just cited rests. A statute of the State of Indiana required each railway company of the State to file with the auditor of the county where its principal office was situate a statement of the amount of its capital stock for the purposes of taxation. This statement was to be filed between the 1st of January and the 1st of June each year. Another statute provided that if a railway company of the State failed to file with such auditor such statement, then it should be the duty of the auditor himself to make the statement, or list, for the purposes of taxation, the amount of the capital stock of such railway company, determining the facts in the manner provided by statute. A railway company of the State neglected to file with the auditor of the county where its principal office was located between the 1st of January and the 1st of June a statement of the amount of its capital stock, and thereupon the Auditor of State instituted a proceeding in mandamus to compel the railway company to make and file such statement with such county auditor. The District Court awarded the mandamus as prayed. But the Supreme Court reversed the judgment of the District Court, saying: "If it were not provided by statute upon failure of the railroad company to file such statement within the time required by law, the auditor of the county shall proceed to make the same, mandamus would doubtless lie to compel the officer of the road to furnish the list after the time had expired. But the rule is well established that mandamus will not lie where the statute has expressly provided an adequate remedy."

(*Louisville & N. A. R. Co. v. State*, 25 Ind. 181.) To the same effect are *State v. Board of Sup'rs*, 29 Wis. 79; *Marshall v. Sloan*, 35 Iowa, 445.

2. The respondent in the case at bar is a private corporation. By permission of the city of Omaha it is occupying the streets and alleys of that municipality with its poles, wires, and other appliances used in the conduct of the business in which it is engaged. It is a common carrier of news and intelligence. It is a corporation affected with a public use—a public service corporation—and as such it has assumed and is charged with certain public duties, among which are to furnish for a reasonable compensation to any inhabitant of the city of Omaha, a telephone and telephonic service, and to charge each of its patrons for the service rendered or to be rendered the same price it charges every other patron for the same service under substantially the same or similar conditions. *State v. Nebraska Teleph. Co.*, 1 Am. Electl. Cas. 700, 17 Neb. 126; *American Waterworks v. State*, 46 Neb. 194; *Western Union Tel. Co. v. Call Pub. Co.*, 5 Am. Electl. Cas. 673, 44 Neb. 326. But the judgment under consideration determines not only that the telephone company shall render for the relator the service required by him, but fixes and determines as well what compensation the relator shall pay to the respondent for such service. This judgment, then, in effect determines, decides, and fixes the charges which the respondent may lawfully exact for services to be rendered in future by it to its patrons. Where a public service corporation has performed a service, and sues to recover therefor, in the absence of an express contract for a specific compensation, the measure of its damages is a reasonable compensation for the services performed; and whether the compensation which it demands is reasonable is a judicial question. Where the legislature has fixed the compensation which a public service corporation may exact for the performance of a service, then the reasonableness of the compensation so fixed by the legislature—that is, whether the limiting of the corporation to the compensation fixed

by the statute would result in a confiscation of the corporation's property—is a judicial question. *Smythe v. Ames*, 18 Sup. Ct. 418. But the power—the jurisdiction—to determine what compensation a public service corporation may exact for service to be rendered by it we understand to be a legislative, and not a judicial, function. In the case at bar the respondent had not performed services and sued to recover the compensation. If it had, the relator might have defended upon the ground that the compensation demanded was unreasonable, and the court would have had jurisdiction to determine the question. The case at bar is not a suit by the relator for damages against the respondent for its neglect and refusal to render to him for a reasonable compensation the service he demanded. In the case at bar, the relator did not pay the compensation alleged to be exorbitant, which the respondent demanded, and then sue to recover back the excess. Had he done so it may be that the court would have had the power to determine whether the compensation actually demanded and received by the respondent was unreasonable. But here the court determines that the respondent shall perform for the relator a specific service for three months for a specific sum of money. This, in effect, was a determination by the court that three dollars per month was a reasonable compensation for the service required to be rendered by the respondent, and a fixing of the compensation for such service at that price for the future.

We think the history of the legislation of the entire country shows that the power to determine what compensation public service corporations may demand for their services is a legislative function, and not a judicial one. If the courts may determine what compensation a telephone company may exact for a service to be rendered in the future, we know of no reason why the courts may not determine the freight and passenger rates which the railway corporations of the State may charge for the transportation of freight and passengers; and yet the framers of our constitution recognized that this power to fix the com-

pensation of public service corporations was a legislative one, as by that instrument they expressly confer upon the legislature the power from time to time to pass laws establishing reasonable rates or charges for the transportation of passengers and freight. Section 4, art. 11, Const. And it is evident that the legislature has acted upon the theory that this power to fix the compensation of public service corporations is one vested in it by the constitution. This is evident from its creation of the board of transportation, and the powers conferred upon that board; and as late as 1897 the legislature conferred authority upon the mayor and council of cities of the metropolitan class to fix and determine by ordinance what compensation telephone companies doing business within such cities might charge and exact for services rendered or to be rendered by them. Comp. St. 1897, c. 12a, sec. 131. Fixing a compensation which public service corporations may charge for services to be rendered by them is legislating; it is lawmaking. The power of the courts is limited to declaring what the law is, and they are precluded by the constitution from performing legislative functions; and, though the courts of the land have from time to time declared laws fixing the compensation which public service corporations might charge for services to be rendered by them, void because the compensation fixed by the law was unreasonable in that the enforcement of the statute would confiscate the corporation's property, and thereby deprive it of its property without due process of law, we know of no court which has ever claimed that it had authority to determine what compensation would be a reasonable one for a service to be performed by such corporation. The relator must address himself for relief from the grievances of which he complains to the legislative power of the State—to the legislature itself, to the board of transportation, to the mayor and council of the city of Omaha. If the compensation now charged and exacted by the telephone companies of the State is exorbitant and unreasonable, we must presume that the board of transportation, the mayor and council of the city of Omaha,

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and the legislature of the State, one and all of them, will investigate the matter and prescribe a scale of reasonable charges. The judgment of the District Court is reversed, and the proceeding dismissed. Reversed and dismissed.

CLARENCE T. GARDNER V. PROVIDENCE TELEPHONE COMPANY.

Rhode Island Supreme Court, July 26, 1901.

TELEPHONE SERVICE—REASONABLENESS OF REGULATIONS AND RATES.

A telephone company, having a monopoly of the telephone business in a community, may deprive a patron of telephone service because of his refusal to discontinue the use, in connection with the wires of the company, of an extension set not furnished by the company, provided the company will afford similar appliances at reasonable rates. Injunction to prevent discontinuance of service refused.

Dissenting opinion by STINESS, C. J., upon the ground that the rates charged by the company for extension sets was unreasonable, and that no detriment to the company was shown by the patron's use of the "clandestine instruments."

Cases of this series cited in opinion: *State of Ohio v. Bell Teleph. Co.*, vol. 1, p. 299; *State v. D. & A. Tel. & Teleph. Co.*, vol. 3, p. 533; *Atl. & Pac. Tel. Co. v. W. U. Tel. Co.*, vol. 1, p. 81; *Ches. & Pot. Teleph. v. B. & O. Tel. Co.*, vol. 3, p. 196; *State of Missouri v. Bell Teleph. Co.*, vol. 2, p. 404; *Del. & Atl. Tel. & Teleph. Co. v. State*, vol. 4, p. 579.

Appeal by complainant.

Comstock & Gardner, for complainant.

David S. Baker and Dexter B. Potter, for respondent.

DOUGLAS, J.: There is little, if any, dispute as to the facts of this case, which are set forth by the complainant as follows: "This is a bill in equity brought by Clarence T. Gardner, of the city of Providence, against the Providence Telephone Com-

pany, a corporation engaged in the business of renting telephone instruments and affording means of communication by electric telephones in Providence and elsewhere, in the State of Rhode Island, to restrain said corporation from depriving him of telephone service at his residence and office. The bill sets forth the business of the respondent corporation, and that for the purpose of said business it is authorized by its charter to use and does use the public streets and highways; that it rents telephones to its customers, which are connected with a central exchange, and that by means thereof such customers or subscribers are enabled to communicate with the defendant's other subscribers and also with persons in other cities; and that the respondent is the only person or corporation which can legally carry on such business in said city of Providence; that the plaintiff is now and has been for many years a customer of the defendant, renting a telephone instrument both at his office and residence; that he has paid all rentals demanded by the defendant, and has used his telephone properly and in accordance with all reasonable rules and regulations of the defendant, and is willing to pay such rentals and comply with such rules; that he is a physician in active practice both in Providence and throughout the State; that a large proportion of the calls for his services as a physician are received over the telephone, and that deprivation of telephone service would be detrimental to his practice; that the defendant, on the 23rd day of February, 1897, notified the plaintiff that it would at the expiration of one month from the date of said notice cut off his telephone service, refuse to answer his calls, and refuse to connect him with other subscribers. The bill, as heretofore stated, prays that the defendant may be enjoined from taking such action. The answer of the defendant admits that it is a corporation carrying on the business described in the bill, that it uses for the purposes of such business the public streets and highways, and that it is the only person or corporation which can legally carry on such business in the city of Providence. It admits that the plaintiff is one of its

customers, and has paid all charges made against him for telephone service. The answer denies that the plaintiff has used his telephone properly and has complied with all reasonable rules and regulations of the defendant, and alleges that he has violated a regulation of the defendant which provides that no telephone or telephonic instrument shall be used by any customer except such as may be furnished by the company; that the defendant itself furnishes extension sets, so called, as a valuable part of its business; that such extension sets consist of a second telephone and transmitter, connected by wire with the original telephone and transmitter placed in the subscriber's premises, the second set being in another part of such premises; and that the plaintiff, in violation of such rule (claimed by the defendant to be reasonable), has installed both in his office and his residence an extension set not furnished by the defendant. The answer admits that by reason of this alleged violation of a regulation of the defendant the defendant did threaten to deprive the plaintiff of telephone service, and would have done so had not this bill been filed, and claims that it has the legal and equitable right so to do. The answer also contains an extended argument as to the reasonableness of this regulation forbidding the use of private extension sets, based upon the following claims, to wit: (1) That it has expended large sums of money in license fees paid to a parent company for certain portions of its apparatus, in constructing poles and underground lines, in putting up wires and cables, and for other purposes, and that the furnishing of extension sets is a valuable and legitimate part of its business, by means of which, in part, it receives a return for these expenditures; that it is willing to furnish such extension sets to all its customers; and that the use of private extension sets is a destruction of its legitimate income and vested rights. (2) That, by attaching the wires connecting his private extension set (called by the defendant a 'clandestine instrument') to the wires placed by the company on the customer's premises, the subscriber or customer trespasses upon the

company's property. (3) That the wires of the extension sets are hidden from view of the company's inspectors to avoid detection, and the company's property is endangered by the possible presence of strong currents coming over such wires, and the company is made liable for the destruction thereby of other property and injury to persons. (4) The answer does not allege, but much testimony has been introduced in the attempt to show, that the use by a subscriber of a private extension set is liable to interfere with the working of the company's system. The testimony shows that the plaintiff is a physician with a large practice in Providence and vicinity; that in 1879 or 1880 he had put in both at his office and at his residence a telephone instrument furnished by the defendant company and connected with its exchange. These were grounded-circuit instruments; that is, they were connected with the defendant's exchange by a single wire, the current returning through the ground. These telephones are on a private line; that is, there are no other subscribers having instruments connected with the wire which connects the plaintiff's office and residence with the defendant's exchange. The instruments furnished by the defendant are of the Blake transmitter type, so called, consisting of a board about twenty inches in length, to which is attached the transmitter, a box with a pressed carbon attached to a spring, and a bell, and also, beneath, a large box containing a battery, all these being attached to the wall of the subscriber's premises. At the plaintiff's office this instrument is attached to the wall about twenty feet from the plaintiff's desk. At his residence it was placed on the wall of his bedroom. For the use of these instruments the plaintiff has paid and now pays to the defendant the sum of eighty-two dollars per annum. About the year 1896 the plaintiff purchased two extension instruments, and paid for them fifty dollars each. These he connected with the defendant's wires inside the complainant's premises at office and residence. The one at the office is placed upon the plaintiff's desk; that at the house, in his lower hall. These instruments are of

what is called the 'long-distance type,' consisting of a shaft placed upon a standard with a switch on which hangs a watch-case receiver, a granular carbon transmitter, and a platinum diaphragm, not differing materially, except in superior lightness and elegance of construction, from the long-distance extension instruments chiefly used by the defendant. The plaintiff testifies that by use of these instruments the convenience and effectiveness of his telephone service has been greatly increased, and that he has had less occasion than ever before to call upon the defendant to remedy defects in the service. The defendant shows that there have been during the past five years some half dozen complaints of bad service at the plaintiff's office and residence, and that on some of these occasions the trouble has been traced to these extension instruments. These instruments, after five years' use, are in as good condition as when they were purchased. The same instruments for which the plaintiff paid \$50 in 1896, or the very best type of long-distance extension instrument, as good and effective in every way as the instruments furnished by the company, can now be purchased outright for \$12.50 at retail. There has been no attempt on the part of the plaintiff to conceal the use of these extension sets. The instruments and the wires connecting them are at all times in plain sight, and the attention of the defendant's agents has been called to them whenever they visited the plaintiff's premises. Up to 1896 or 1897 there were no extension sets except those manufactured by the Bell Telephone Company, and it was, of course, unnecessary to make any rules with reference to their use. Indeed, no rule with reference to their use has ever been promulgated. A prohibition against the use of such instruments was printed in the revised form of application and contract adopted by the defendant in 1896 or 1897, and subscribers who have attached such instruments were notified that the telephone company forbade their use, and were required to remove them. The question which thus arises for the decision of the court is whether a corporation having a monopoly of the telephone business in a com-

munity can deprive a subscriber of telephone service for the reason that he refuses to discontinue the use, in connection with the wires of the company on the subscriber's premises, of an extension set not furnished by the company.

The general principles of law upon which the complainant relies are well settled. The telephone company has rights granted by the city in pursuance of legislative authority to make certain uses of the highways of the city, and no other company has similar rights. By municipal action therefor, invoked by the defendant, the complainant is forced to deal with the defendant if he desires telephonic service. Undoubtedly it is a condition of such a grant that the grantee shall furnish to such of the public as desire it complete service of the kind in which it deals, with such appliances for use and convenience as the State of the art affords from time to time. And it cannot be disputed that the company may impose such reasonable rules for the use of its appliances as are required to insure efficiency and safety, and that no unreasonable rule or requirement can be enforced as a condition of furnishing equal service to the whole public. The service which a telephone company undertakes to render, and which it receives special privileges from the public that it may render, is analogous to that of a common carrier, and its obligations to the public are to be determined upon the same principles which have long been settled with reference to persons or corporations engaged in business which requires special public concessions. The general principle is laid down in *Munn v. People*, 94 U. S. 113, 24 L. Ed. 77. The application to telephone companies is made in many cases. In *State v. Telephone Co.*, 1 Am. Electl. Cas. 299, 36 Ohio St. 296, 38 Am. Rep. 583, McILVANE, C. J., says: "It appears to us as a proposition too plain to admit of argument that, where the beneficial use of patented property or of any species of property requires public patronage and government aid—as, for instance, the use of public ways and the exercise of the right of eminent domain—the State may impose such conditions and regulations as in the

judgment of the lawmaking power are necessary to promote the public good." In *State v. Delaware & A. Tel. & Tel. Co.* (C. C.), 3 Am. Electl. Cas. 533, 47 Fed. 633, 640, WALES, J., after commenting upon many decisions, says: "From the foregoing review of the law it follows that the respondent is a common carrier which has offered to the public the use of a telephonic system for the rapid conveyance of oral messages from one point to another; that one of the most important duties of a common carrier is that it shall serve all persons alike, impartially, and without unreasonable discrimination," etc.; and the decision proceeds to declare a contract contrary to this duty to be void as against public policy. To the same effect as to the general relations of a telephone company to the public are *Atlantic & P. Tel. Co. v. W. U. Tel. Co.*, 1 Am. Electl. Cas. 81, 4 Daly, 527; *Chesapeake & P. Tel. Co. v. Baltimore & O. Tel. Co.*, 3 Am. Electl. Cas. 196, 66 Md. 399, 7 Atl. 809; *State v. Bell Tel. Co.* (C. C.), 2 Am. Electl. Cas. 404, 23 Fed. 539; *Delaware & A. Tel. & Tel. Co. v. State*, 4 Am. Electl. Cas. 579, 2 C. C. A. 1, 50 Fed. 677; and other cases which assume the principles above stated as settled law, and discuss various applications of them.

The defendant does not argue against these general propositions of law, but insists that it is reasonable for it to claim the right to furnish and control the whole telephonic plant on the premises of a subscriber which shall be connected with its lines. We cannot assent to all the reasoning of the defendant's counsel in support of this proposition. We are inclined to believe that his apprehension of danger from other electric conductors on the subscriber's premises is exaggerated. The fact that the company has submitted to a *modus vivendi* with the complainant since it first knew of his use of an extension set, which has continued the attachment till the present time without any serious accident, indicates that in this instance safety is not a controlling consideration. And we cannot agree that any slight modification by the subscriber of the use of the instrument placed in

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his house, as *e g.* by the attachment of a funnel for magnifying the sound, would constitute a trespass on the property of the company, in the technical meaning of the word. Neither does it appear that the addition of an extension set to a customer's circuit increases the labor of the operator at the switchboard. So long as the subscriber is entitled to the use of the line as often as his business requires, and but one person can use the line at a time either through the main telephone or the extension set, there can be no more calls sent in than the rates already established have contemplated. Indeed, the saving of time to the central office by reason of the superior accessibility of the customer, who has an extension set nearer than the telephone is an advantage to the company. But we do believe that the claim finds justification and support in the nature of the service and the agencies employed in it. The telephone circuit includes delicate instruments actuated by currents of electricity of feeble power. The introduction into a circuit of extension sets requires technical skill to secure perfect adaptation to the original circuit and its appliances. It seems plain to us that this should be the work of the same party which builds and operates the original circuit, and subject to the same routine of inspection. The original circuit and the additions to it should be a unit in construction, operation, and management. The circulation of the electric current by which the telephone is operated differs essentially from the distribution of illuminating gas, though both are supplied from a central source and used upon the premises of a customer. The gas which is supplied through a meter is forever after beyond any control of the producer. No use that the customer makes of it can react so as to affect the company or its distributing system. Whether a cubic foot of gas is used for light by means of one burner or another, or for heating by one system of stove or furnace or another, can make no possible difference to the manufacturer, and hence it would be unreasonable for a gas company to insist upon supplying stoves or burners, or to dictate in what position on the premises the gas

should be finally consumed. An electric current, on the contrary, does not terminate in, but passes through, the customer's premises. The circuit must be complete, either wholly along a metallic conductor, or partly through the earth. The current while passing from as well as to the premises of the customer exerts its natural influence upon conductors and resistances which it encounters. Any resistance or interruption affects or is liable to affect the whole system. Any appliance introduced anywhere to modify the action of the current may produce results at any other point in the circuit. When the telephone is in use the subscriber's circuit is connected with that which includes his correspondent, and in practice may be connected with one circuit after another throughout the whole system. A company, therefore, furnishing the use of an electric current generated by its own apparatus may reasonably require that it shall not be diverted over other channels, and used to actuate other appliances with which the company is not familiar, and which have not received its approval. Now, the best adaptation of an extension set to the system to which it is added, and the best supervision of such a set and system, and the best service to a customer, may reasonably be expected when the whole system and its extensions are installed and controlled by the company. It is therefore reasonable that the company should insist upon the right to furnish extension sets when they are desired, or in the alternative refuse to give or continue its service. In the words of the Supreme Court of Illinois in *People v. W. U. Tel. Co.*, 46 N. E. 731, it "has a right to choose its own agencies for the performance of its duties." But this right is contingent, and not absolute. It is subject to the obligation we have alluded to above, viz., that the company shall be able and willing to furnish extension sets as efficient and convenient as the state of the art affords. It is the duty of the company to keep abreast of the march of improvement, so as to serve its customers as conveniently as they can provide for themselves from the market. Such improvements and extensions as are offered must not be accom-

panied with extortionate demands for compensation, so as to render the offer nugatory. The price charged for the extra accommodation must bear some proportion to the actual cost of it, and the additional burden of care and maintenance. While the court exercises no supervision over the prices fixed by a telephone company generally, it must consider the amount charged for the performance of a duty to a customer, in deciding upon the reasonableness in any particular case of requiring the customer to seek such service exclusively of the company. So long as the company observes these equitable principles in acting under its rule, the court will consider its action reasonable and will sustain it. If, however, the company neglects its duty to the public, and is not provided with the means to secure the accommodation of its customers, or, having at its command such appliances, refuses to furnish them, except at exorbitant rates, we cannot question the right of the customer to supplement the imperfect service of the company with approved appliances procured elsewhere, provided that such appliances can be used in connection with the company's circuits without detriment to their harmonious operation. We think, however, that before a customer is justified in such an invasion of the *prima facie* rights of the company he must apply to the company to furnish the additional accommodation desired, and if the company refuses or couples its consent with unreasonable conditions he must be prepared to show affirmatively that the appliance which he annexes to the company's system is not injurious to the system or its operation before he can have the assistance of a court of equity to compel the company to include his devise in their service. The complainant does not bring himself within these limitations. He began by annexing to the defendant's circuit an apparatus of his own selection, without first requesting the company to furnish him with an extension set, or asking their terms for such extension of their service. In regard to the set which he uses, he has not made it clear that it is suitable for use with the grounded circuit which he hires of the company. The

company itself does not use this apparatus in connection with grounded circuits. It is plain that the complainant has no right to insist upon a particular form of apparatus if the company are ready to furnish one which will substantially accomplish the same purpose, and which is adapted to the circuit they operate. It does not appear from any evidence in the case that they have not been and are not now, ready and willing to do this for a reasonable compensation. On the contrary, they say they are willing and offer to do so. In these circumstances, an injunction must be refused.

STINESS, C. J. (dissenting): Agreeing with the general statements of law in the foregoing opinion, I am unable to agree with its conclusion, which, to my mind, is inconsistent with it. Having said that the defendant's proposition, that it should have the right to furnish and control the whole telephonic plant on the premises of a subscriber cannot be assented to in full, and, further, that "such improvements as are offered must not be accompanied with extortionate demands for compensation, so as to render the offer nugatory," and that "if, however, the company neglects its duty to the public, and is not provided with means to secure the accommodation of its customers, or, having at its command such appliances, refuses to furnish them, except at exorbitant rates, we cannot question the right of the customer to supplement the imperfect service of the company with approved appliances procured elsewhere, provided that such appliances can be used in connection with the company's circuits without detriment to their harmonious operation," the logical result from the facts in this case is a decree for the complainant. The opinion asserts the rights of a subscriber to supplement the service of the company under two conditions, both of which appear in this case. First If the company demands exorbitant rates. The complainant now receives satisfactory service for \$82 per year, and the company demands \$220 for the same service. The extension instrument costs \$12.50 at retail, and the company charges \$18 per year for the

use of it—at least \$150 per cent. of its cost. The additional charge is made for a metallic circuit, which is neither shown to be necessary nor of advantage to the subscriber or to the company, except in the matter of income to the company. Under these circumstances, the company's demand is manifestly exorbitant. Second. No detriment to the company is shown by the complainant's use of the extension set, either in its demand upon service or in safety. On the contrary, the opinion is in favor of the complainant on both of these grounds. I am therefore unable to see any sufficient reason for refusing the complainant's prayer for an injunction.

NOTE.—In *Sterne v. Metropolitan Teleph. & Tel. Co.*, New York Supreme Court, Appellate Division, First Department, June, 1897 (19 App. Div. 316), an action for an injunction restraining a telephone company from removing a telephone from plaintiff's place of business unless he would make a new contract at an advanced rental, *held*, assuming that the defendant's business was such that it was bound to furnish telephone service to the plaintiff upon the payment of a reasonable compensation therefor, that testimony as to the contents of defendant's books of accounts was necessary and material so as to warrant the granting of an order for inspection under section 872 of the Code of Civil Procedure.

In *Gould v. Edison Elec. Illum. Co.*, New York Supreme Court, Special Term, First Department, October 25, 1899 (29 Misc. Rep. 241), *held*, that a stipulation in a contract for electric lighting, fixing a minimum monthly charge of \$1.50, was reasonable within the meaning of section 65 of the Transportation Corporations Law.

In *Western Union Tel. Co. v. Myatt*, U. S. Circuit Court, District of Kansas, November 27, 1899, *held*, that the legislature of Kansas having, by a statute (Sp. Sess. Laws 1898, c. 38), fixed a maximum rate on telegraph messages between points in the State, and charged the court of visitation of the State with the duty of enforcing such rate unless it should judicially determine it to be unreasonable, and it having been adjudged that such court is without judicial power to determine the reasonableness of such rate, a telegraph company, upon a showing that the rate so fixed is below the actual cost of the service, is entitled to an injunction restraining the enforcement of such rate on the ground that its enforcement would operate to deprive it of its property without due process of law, and would be a denial of the equal protection of the laws.

In *Ashley v. Rocky Mountain Bell Teleph. Co.*, Montana Supreme Court, April 22, 1901 (64 Pac. Rep. 765), a telephone contract providing for payment in advance authorized the company to terminate the contract and re-

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move the telephone on default in payment, by serving written notice on the subscriber, and provided that the contract could not be varied or waived except by a writing signed by the general manager of the company. The company's collector called for a month's installment of rent on the day on which it was due, but as the subscriber did not have his check book with him, the collector suggested that he would call again the following day. The company thereupon gave written notice cancelling the contract, and refused payment when tendered the next day. The subscriber succeeded in an action against the company, and was allowed judgment for continued damages alleged to have been sustained by him through loss of business at his livery stable, where the telephone had been under the contract. The judgment was reversed, the court assigning as grounds of error, refusal of the trial court to instruct the jury that the failure to pay the collector on demand authorized the company to forfeit the contract unless there was a written extension signed by the general manager. It was also held that the company might show in mitigation of damages that it offered to replace the telephone on payment of the cost of connection, since the plaintiff was required to do every act in his power to decrease the damages.

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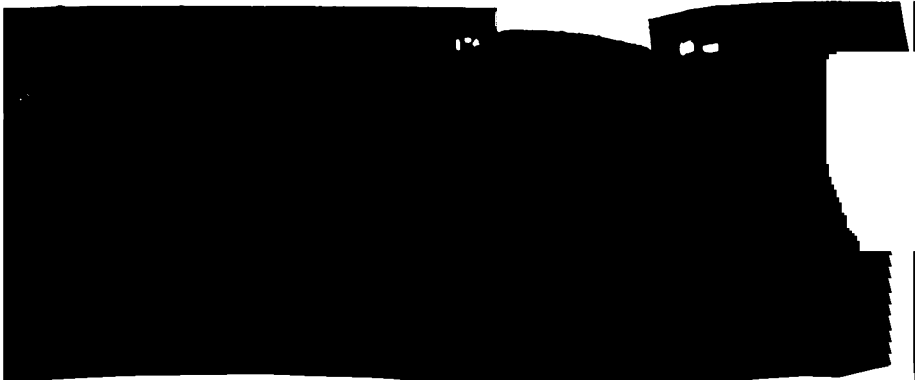
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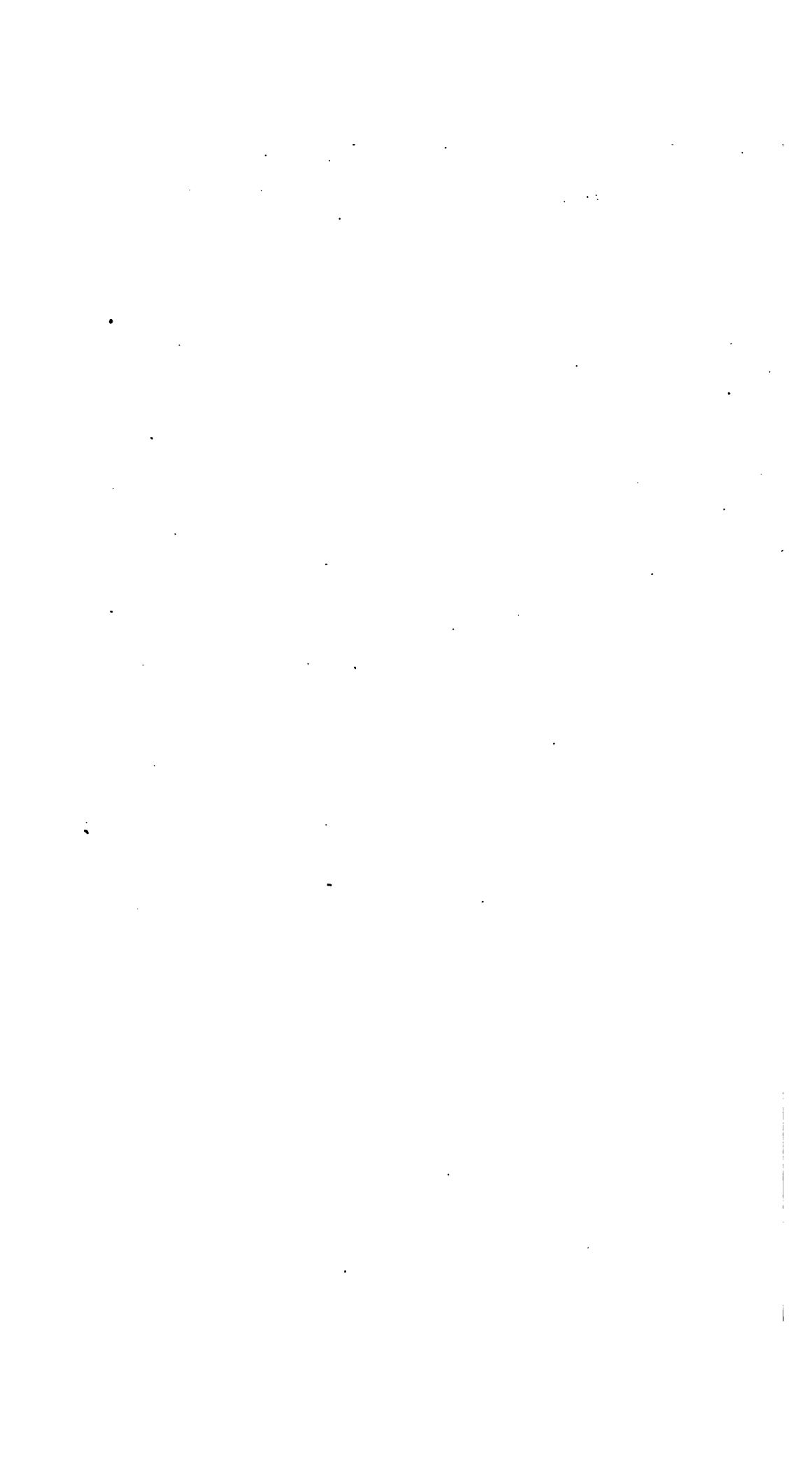
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